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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 318

NATIONAL LABOR RELATIONS BOARD, PETITIONER

vs.

ROCKAWAY NEWS SUPPLY CO., INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 5, 1952

CERTIORARI GRANTED OCTOBER 27, 1952

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IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

ROCKAWAY NEWS SUPPLY COMPANY, INC.,
Respondent.

Petition for Enforcement of an Order of the National Labor Relations Board.

To the Honorable, the Judges of the United States Court of Appeals for the Second Circuit:

The National Labor Relations Board, pursuant to the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. IV, Secs. 151, *et seq.)*, hereinafter called the Act, respectfully petitions this Court for the enforcement of its order against Respondent, Rockaway News Supply Company, Inc., Valley Stream, Nassau County, New York, its officers, agents, successors and assigns. The proceeding resulting in said order is known upon the records of the Board as "In the Matter of Rockaway News Supply Company, Inc., and Charles Waugh, Case No. 2-CA-1342."

In support of this petition the Board respectfully shows:

(1) Respondent is a New York Corporation engaged in business in the State of New York, within this judicial cir-

cuit where the unfair labor practices occurred. This Court therefore has jurisdiction of this petition by virtue of Section 10 (e) of the National Labor Relations Act, as amended.

(2) Upon all proceedings had in said matter before the Board as more fully shown by the entire record thereof certified by the Board and filed with this Court herein, to which reference is hereby made, the Board on July 20, 1951, duly stated its findings of fact and conclusions of law, and issued an order directed to the Respondent, its officers, agents, successors and assigns.

The aforesaid order provides as follows:

ORDER

Upon the entire record in this case, and pursuant to Section 10 (c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that the Respondent, Rockaway News Supply Company, Inc., Valley Stream, Nassau County, New York, its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Interfering with, restraining, or coercing its employees in the exercise of this right to assist Nassau County Typographical Union #915 (AFL), or any other labor organization, and to engage in concerted activities for the purpose of mutual aid and protection, or to refrain from any or all of such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8 (a) (3) of the Act.

Petition for Enforcement of an Order of the National Labor Relations Board.

(b) Discouraging activity on behalf of and membership in Nassau County Typographical Union #915 (AFL), or any other labor organization, by in any manner discriminating in regard to the hire or tenure of employment, or any term or condition of employment, of its employees.

2. Take the following affirmative action which, it is found, will effectuate the policies of the Act:

(a) Offer to Charles Waugh immediate and full reinstatement to his former position, or to a substantially equivalent position, without prejudice to his seniority and other rights and privileges.

(b) Make whole Charles Waugh for any loss of pay he may have suffered by reason of the Respondent's discrimination against him, in the manner set forth in Section V of the Intermediate Report, entitled "The remedy."

(c) Upon request, made available to the National Labor Relations Board, or its agents, for examination and copying, all payroll records, social security payment records, time cards, personnel records and reports, and all other records necessary to analyze and compute the amount of back pay due and the right of reinstatement under the terms of this Order.

(d) Post immediately at its places of business at 518 Rockaway Avenue in Valley Stream, Nassau County, New York, and at 45-35 36th Street, Long Island City, Queens County,[10] New York, copies of the notice attached hereto, marked "Appendix A". Copies of such notice, to be fur-

[10] In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be inserted, before the words, "A DECISION AND ORDER," the words, "A DECREE OF THE UNITED STATES COURT OF APPEALS ENFORCING."

nished by the Regional Director for the Second Region, after being duly signed by the Respondent's representative, shall be posted by the Respondent immediately upon receipt thereof and maintained by it for sixty (60) consecutive days thereafter in conspicious places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for the Second Region (New York City) in writing within ten (10) days from the date of this Order, what steps the Respondent has taken to comply therewith.

(3) On July 20, 1951, the Board's Decision and Order was served upon Respondent by sending a copy thereof postpaid, bearing Government frank, by registered mail, to Respondent's counsel.

(4) Pursuant to Section 10 (e) of the National Labor Relations Act, as amended, the Board is certifying and filing with this Court a transcript of the entire record of the proceeding before the Board, including the pleadings, testimony and evidence, findings of fact, conclusions of law, and order of the Board.

WHEREFORE, the Board prays this Honorable Court that it cause notice of the filing of this petition and transcript to be served upon Respondent and that this Court take jurisdiction of the proceeding and of the questions determined therein and make and enter upon the pleadings, testimony and evidence, and the proceedings set forth in the transcript and upon the order made thereupon as

Appendix A Attached to Petition for Enforcement of an Order of the National Labor Relations Board.

set forth in paragraph (2) hereof, a decree enforcing in whole said order of the Board, and requiring Respondent, its officers, agents, successors and assigns to comply therewith.

NATIONAL LABOR RELATIONS BOARD,

By /s/ A. NORMAN SOMERS,
Assistant General Counsel.

Dated at Washington, D. C. this day of January, 1952.

APPENDIX A.

NOTICE TO ALL EMPLOYEES

PURSUANT TO
A DECISION AND ORDER

of the National Labor Relation Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

WE WILL NOT interfere with, restrain, or coerce our employees in the exercise of their right to assist NASSAU COUNTY TYPOGRAPHICAL UNION #915 (AFL), or any other labor organization, and to engage in concerted activities for the purpose of mutual aid or protection, or to refrain from any or all of such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 3 (a) (3) of the Act.

Appendix A Attached to Petition for Enforcement of an Order of the National Labor Relations Board.

WE WILL NOT discourage activity on behalf of and membership in NASSAU COUNTY TYPOGRAPHICAL UNION #915 (AFL), or any other labor organization, by discriminating in any manner with regard to the hire and tenure of employment of our employees, or any term or condition of employment.

WE WILL offer Charles Waugh immediate and full reinstatement to his former or substantially equivalent position without prejudice to any seniority or other rights and privileges previously enjoyed, and make him whole for any loss of pay suffered as a result of our discrimination against him.

WE WILL NOT discriminate in regard to hire or tenure of employment or any term or condition of employment against any employee because of activity on behalf of any such labor organization.

All our employees are free to assist or refrain from assisting the above-named union or any other labor organization except to the extent that this right may be affected by an agreement in conformity with Section 8 (a) (3) of the Act, as amended.

ROCKAWAY NEWS SUPPLY COMPANY, INC.
(Employer)

Dated ..... By .....
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

Decision and Order.

D-5258
Valley Stream, N. Y.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

—o—

In the Matter of
ROCKAWAY NEWS SUPPLY COMPANY, INC.,
and
CHARLES WAUGH.

Case No. 2-CA-1342.

—o—

On February 21, 1951, Trial Examiner Lee J. Best issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that they cease and desist therefrom and take certain affirmative action as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the Respondent filed exceptions to the Intermediate Report and a brief in support of its exceptions, and the General Counsel and Waugh, the charging party, filed briefs in support of the Intermediate Report.

The Board has considered the Intermediate Report, the exceptions and briefs, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner with the exceptions, modifications, and additions set forth below:

Decision and Order.

1. On March 7, 1950, the Respondent discharged Charles Waugh, a member of the Newspaper and Mail Deliverers' Union, hereinafter called the Union, which was the contractual representative of the Respondent's employees, because of his refusal, in the course of his duties, to cross a picket line established at the premises of the Nassau Daily Review Star by the Nassau County Typographical Union #915 (AFL), hereinafter called the Typographers. The Trial Examiner found that the Respondent thereby violated Section 8 (a) (3) and (1) of the Act. We agree.

The Respondent urges that Waugh's refusal to cross the picket line violated the no-strike clause of its agreement with the Union[1] and that his discharge was therefore not protected by the Act. In *Rockaway News Supply Company, Inc.*,[2] the Board found the identical contract involved herein to be illegal in its entirety and set it aside. It would not effectuate the policies of the Act to give effect in this case to a contract which the Board set aside in its entirety in a prior proceeding. Accordingly, the no-strike clause of that contract can have no impact upon Waugh's refusal to cross the picket line.[3]

The Respondent contends, however, that apart from the question of the validity of the contract, Waugh's conduct constituted a "partial strike" not protected by the Act.

[1] Sec. 19-n of the contract provides that "No strikes, lockouts or other cessation of work or interference therewith shall be ordered or sanctioned by any party hereto during the term hereof except as against a party failing to comply with a decision, award or order of the Adjustment Board."

[2] 94 NLRB No. 156.

[3] As the Board in the earlier *Rockaway* case, *supra*, set the entire contract aside, we regard as immaterial the fact that, as asserted by the Respondent, the contract provided for the severability of any portion thereof found to be illegal.

We do not agree. The record is clear that Waugh's failure to perform part of his duties was not occasioned by an insubordinate refusal to perform work tasks assigned to him by the Respondent, an unwillingness to comply with its rules, or a desire unilaterally to impose or to alter his own terms and conditions of employment while remaining at work. In *Cyril de Cordova & Bro.*,[4] the Board found that an employee's failure to perform part of his duties by reason of his refusal to cross a lawful picket line at the plant of an employer other than his own was a protected form of concerted activity. Accordingly, for the reasons set forth in that case, we find this contention of the Respondent to be without merit.

Although Waugh's refusal to cross the picket line was a protected activity, the Respondent, as a normal incident of its right to maintain its operations, could have required Waugh to elect whether to perform all his duties or, as a striker, to vacate his job and make way for his replacement by the Respondent.[5] Instead the Respondent discharged Waugh.[6]

The Respondent seeks to distinguish the instant case from the *de Cordova* case on the ground that Waugh was not, as was the employee involved in that case, a member of the union conducting the picketing. We do not regard this dis-

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[4] 91 NLRB No. 187.

[5] *Pinaud, Incorporated,* 51 NLRB 235; *Gardner-Denver Company,* 58 NLRB 81.

[6] The record shows that after his discharge on March 7, Waugh returned the following day seeking to be rehired, but the Respondent told him, "You know I can't hire you. You're fired." Thereafter Waugh sought reemployment daily for a period of about 3 weeks but was told by the Respondent that it could not hire him. The record does not indicate, however, whether Waugh was willing to cross the picket line, if necessary, or whether he had been permanently replaced by the Respondent.

tinction as determinative.[7] The fact that employees who participate in concerted activities are not members of the same union, or indeed of any union, or employees of the same employer, does not alter the concerted nature of such activity or deprive it of the protection accorded such activity by the Act.[8] In refusing to cross the Typographers' picket line Waugh was making common cause and acting in concert with the Typographers.

2. We do not adopt the Trial Examiner's finding that the discharge of Waugh by the Respondent was a continuation of unlawful support rendered to the Newspaper and Mail Deliverers' Union to encourage membership in that organization, as no such violation was alleged or litigated.[9]

ORDER.

Upon the entire record in this case, and pursuant to Section 10 (c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that the Respondent, Rockaway News Supply Company, Inc., Valley Stream, Nassau County, New York, its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Interfering with, restraining, or coercing its employees in the exercise of their right to assist Nassau Coun-

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[7] The Intermediate Report in the *de Cordova* case stated: "Finn [the discharged employee] had a substantial and legitimate interest in the successful prosecution of the strike against the Exchange, *not only because of his union membership*, but also because of the reciprocal effect improved conditions in neighboring and associated business of like kind might have on his own future conditions of employment." (Emphasis added.)

[8] *J. G. Boswell Co.*, 136 F. 2d 585, 596 (C. A. 9); *N. L. R. B. v. Peter Cailler Kohler Swiss Chocolates Company, Inc.*, 130 F. 2d 503 (C. A. 2); *Fort Wayne Corrugated Paper Co. v. N. L. R. B.*, 111 F. 2d 869, 874.

[9] We note, however, our finding in the earlier *Rockaway* case, *supra*, that the Respondent had unlawfully lent its support to the Newspaper and Mail Deliverers' Union in violation of Section 8 (a) (2) of the Act.

ty Typographical Union #915 (AFL), or any other labor organization, and to engage in concerted activities for the purpose of mutual aid and protection, or to refrain from any or all of such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8 (a) (3) of the Act.

(b) Discouraging activity on behalf of and membership in Nassau County Typographical Union #915 (AFL), or any other labor organization, by in any manner discriminating in regard to the hire or tenure of employment, or any term or condition of employment, of its employees.

2. Take the following affirmative action which, it is found, will effectuate the policies of the Act:

(a) Offer to Charles Waugh immediate and full reinstatement to his former position, or to a substantially equivalent position, without prejudice to his seniority and other rights and privileges.

(b) Make whole Charles Waugh for any loss of pay he may have suffered by reason of the Respondent's discrimination against him, in the manner set forth in Section V of the Intermediate Report, entitled "The remedy."

(c) Upon request, make available to the National Labor Relations Board, or its agents, for examination and copying, all payroll records, social security payment records, time cards, personnel records and reports, and all other records necessary to analyze and compute the amount of back pay due and the right of reinstatement under the terms of this Order.

(d) Post immediately at its places of business at 518 Rockaway Avenue in Valley Stream, Nassau County, New

York, and at 45-35 36th Street, Long Island City, Queens County, New York, copies of the notice attached hereto, marked "Appendix A".[10] Copies of such notice, to be furnished by the Regional Director for the Second Region, after being duly signed by the Respondent's representative, shall be posted by the Respondent immediately upon receipt thereof and maintained by it for sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for the Second Region (New York City) in writing within ten (10) days from the date of this Order, what steps the Respondent has taken to comply therewith.

Signed at Washington, D. C. July 20, 1951.

PAUL M. HERZOG,
Chairman.

JOHN M. HOUSTON,
Member.

JOHN J. REYNOLDS, JR.,
Member.

ABE MURDOCK,
Member.

(Seal) NATIONAL LABOR RELATIONS BOARD.

[10] In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be inserted, before the words, "A DECISION AND ORDER," the words, "A DECREE OF THE UNITED STATES COURT OF APPEALS ENFORCING."

Appendix A Attached to Decision and Order.

D-5258

APPENDIX A

NOTICE TO ALL EMPLOYEES

PURSUANT TO
A DECISION AND ORDER

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

WE WILL NOT interfere with, restrain, or coerce our employees in the exercise of their right to assist NASSAU COUNTY TYPOGRAPHICAL UNION #915 (AFL), or any other labor organization, and to engage in concerted activities for the purpose of mutual aid or protection, or to refrain from any or all of such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the Act.

WE WILL NOT discourage activity on behalf of and membership in NASSAU COUNTY TYPOGRAPHICAL UNION #915 (AFL), or any other labor organization, by discriminating in any manner with regard to the hire and tenure of employment of our employees, or any term or condition of employment.

WE WILL offer Charles Waugh immediate and full reinstatement to his former or substantially equivalent position without prejudice to any seniority or other rights and privileges previously enjoyed, and make him whole for any loss of pay suffered as a result of our discrimination against him

Appendix A Attached to Decision and Order.

WE WILL NOT discriminate in regard to hire or tenure of employment or any term or condition of employment against any employee because of activity on behalf of any such labor organization.

All our employees are free to assist or refrain from assisting the above-named union or any other labor organization except to the extent that this right may be affected by an agreement in conformity with Section 8 (a) (3) of the Act, as amended.

ROCKAWAY NEWS SUPPLY COMPANY, INC.
(Employer)

Dated ..... By .....
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

Intermediate Report.

IR-417

UNITED STATES OF AMERICA

BEFORE THE

NATIONAL LABOR RELATIONS BOARD

DIVISION OF TRIAL EXAMINERS

Washington, D. C.

In the Matter

of

ROCKAWAY NEWS SUPPLY COMPANY, INC.

and

CHARLES WAUGH.

Case No. 2-CA-1342.

Miss Helen F. Humphrey, for the General Counsel.

Hyman Waldman, Esq., of New York, N. Y. for the Charging Party.

Julius Kass, Esq., and Richard L. Halpern, Esq., (Bandler, Haas & Kass), of New York, N. Y., for the Respondent.

STATEMENT OF THE CASE.

Upon a charge filed by Charles Waugh, herein called the Charging Party, on April 7, 1950, the General Counsel of the National Labor Relations Board,[1] by the Regional Director for the Second Region (New York, New York), issued a complaint dated November 8, 1950, against Rock-

[1] For identification separately called herein the General Counsel and the Board.

away News Supply Company, Inc., herein called the Respondent, alleging that the Respondent has engaged in, and is engaging in, unfair labor practices affecting commerce within the meaning of Section 8 (a) (1) and (3) and Section 2 (6) and (7) of the National Labor Relations Act, as amended (61 Stat. 136), herein called the Act.

With respect to the unfair labor practices, the complaint alleges in substance that the Respondent, on or about March 7, 1950, discharged Charles Waugh, and thereafter failed and refused to reinstate him, for the reason that he refused to cross a picket line maintained by the Nassau County Typographical Union #915 (AFL), herein called the Typographical Union, and thereby engaged in concerted activities with other employees for the purpose of mutual aid or protection.

Copies of the complaint, charge, and a notice of hearing thereon, were duly served upon the Respondent and Charles Waugh.

Thereafter the Respondent filed an answer to the complaint, admitting the discharge and refusal to reinstate Charles Waugh, but denied that such actior constituted unfair labor practices. As an affirmative defense, the Respondent alleges in substance that pursuant to a collective bargaining agreement entered into by and between the Newspaper and Mail Deliverers' Union of New York and Vicinity and the Respondent, the Adjustment Board, therein constituted, found that Waugh was discharged for cause: and that by virtue of the collective bargaining agreement, the National Labor Relations Board is barred from ordering the reinstatement of the Charging Party.

Intermediate Report.

Pursuant to notice, a hearing was held at New York, New York, on December 1, 1950, before the undersigned Trial Examiner, duly designated by the Chief Trial Examiner. All parties were represented by counsel, participated in the hearing, and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence pertinent to the issues involved.

Ruling on a motion by the General Counsel to strike the affirmative defense was reserved. Motion by the Respondent to dismiss the complaint for failure to state a cause of action was denied. Motion by the Respondent to exclude individual counsel of the Charging Party from participation in the hearing was denied under Section 203.38 of the Board's Rules and Regulations, Series 5. Motion by the Respondent to dismiss when the General Counsel rested was denied with leave to renew at the close of all the evidence. Upon renewal of the motion, ruling thereon was reserved, and is now denied. Motion by the General Counsel to conform the pleadings to the proof was granted without objection.

Opportunity was afforded all parties to argue orally upon the record, and to file briefs and proposed findings of fact and conclusions of law. Briefs received from the General Counsel, counsel for the Charging Party, and the Respondent have been given due consideration.

Upon the entire record in the case, and from my observation of the witnesses, I make the following:

FINDINGS OF FACT

I. The business of the Respondent

Rockaway News Supply Company, Inc., is a corporation organized and existing by virtue of the laws of the State of New York with its principal office and place of business located at 518 Rockaway Avenue, Valley Stream, Nassau County, New York. It also maintains a place of business at 45-35—36th Street, Long Island City, Queens County, New York. At all times herein concerned, it was engaged in and continues to engage in the sale, distribution, and delivery of newspapers, magazines, periodicals, and other publications to stores, newsdealers, and other retail distributors, pursuant to consignment contracts with the publishers. Pursuant to exclusive publisher franchises for their distribution in several counties in Long Island, New York, it has delivered and continues to deliver such newspapers as the New York Times, New York Herald Tribune, New York World-Telegram and Sun, New York Post, New York Mirror, and New York Journal-American; which are recognized channels and instrumentalities of interstate commerce, and utilize the facilities of one or more interstate and world-wide wire services, such as the Associated Press, the United Press, and the International News Service.

During the past year, the publisher of each of the above-named newspapers caused to be shipped in interstate commerce from its respective New York plants to States of the United States outside of New York newspapers valued in excess of $25,000. In the course and conduct of its business during the same period, the Respondent transported approximately 35 percent of the newspapers it handled from

their places of publication in New York, New York, to its places of business and to the retailers by whom they were sold. During the same period the Respondent returned magazines valued in excess of $25,000 to publishers located outside the State of New York by shipment in interstate commerce.

During the past year in the course and conduct of its business, the Respondent performed services valued in excess of $50,000 in the distribution of the aforesaid publications.

It is found, therefore, and the Respondent concedes, that Rockaway News Supply Company, Inc., is engaged in commerce within the meaning of the Act.

II. The labor organizations involved

The Newspaper and Mail Deliverers' Union, and Nassau County Typographical Union #915 (AFL) are labor organizations within the meaning of Section 2 (5) of the Act.

III. The unfair labor practices

A. *Historical background*

For approximately 7 years prior to 1950, Charles Waugh was employed by the Respondent as a chauffeur and routeman. By reason of seniority he was classified as a regular situation holder. He was a member of the Newspaper and Mail Deliverers' Union of New York and Vicinity, which for a period of years had been contractually recognized by the Respondent, without the formality of an election, as the exclusive bargaining representative of its employees.

Intermediate Report.

At the time of his discharge, Waugh was assigned to a regular route, and worked 5 days a week (Tuesdays through Saturdays) from 9:45 a. m. to 6:30 p. m. As a routeman, it was his duty to pick up and deliver various newspapers, magazines, and periodicals along a scheduled route, including the Nassau Daily Review Star, herein sometimes called the Review Star. This newspaper was published by The Daily Review Corporation, Rockville Center, Long Island, New York, and customarily came off the press at 10 a. m. Prior to 10:30 a. m. on each working day, except Saturdays, Waugh picked up a supply of this newspaper at the premises in Rockville Center, and proceeded on his usual route with pickups and deliveries. The pickup operation of the Review Star at Rockville Center consumed approximately 10 or 15 minutes each day.

B. *Events leading to Waugh's discharge*

On the morning of March 2, 1950, Waugh discovered that the Typographical Union, of which he was *not* a member, had established pickets before the premises of the Review Star, which prevented a pickup of that newspaper unless he passed through the picket line. First assuring himself by conference with John J. Byrnes, vice president of the Typographical Union, that the picketing had been ordered and approved by that labor organization in connection with a labor dispute, Waugh notified his foreman (William Gordon) that because he was himself a union man, he would not cross the picket line of another union, and thereby become a "scab" or strike breaker. Gordon replied: "Charlie, I wouldn't take that attitude. It might mean your job." Waugh, nevertheless, insisted that he would not do harm to another union, and requested that some arrangement be

made to have the newspapers delivered to him beyond the picket line, so that union men would not be required to cross it. It is clear that Waugh was willing to continue in the performance of all his duties, provided he was not required to cross the picket line. Such an arrangement was made by the Respondent on Thursday and Friday of that week, but on Tuesday, March 7, 1950, Foreman Gordon said to Waugh, "The Management wants you to cross that picket line. * * * I order you to cross the Nassau Daily Review Star picket line up there and draw papers. * * * Otherwise you are fired; if you refuse, you are fired." Thereupon, Waugh left Respondent's premises, but returned to the premises each succeeding day for a period of about 3 weeks seeking to be rehired. Gordon told him that he could not give him employment.

It appears that other employees of the Respondent did not refuse to pass through the picket line, although they were members of the Newspaper and Mail Deliverers' Union. On March 8 and 9, 1950, pickets of the Typographical Union carried placards containing the following inscription: "Is Waugh the only union mail deliverer?"[2]

C. *Defenses raised by Respondent seeking to justify discharge for cause*

It is contended by the Respondent:

(1) That Waugh's refusal to cross the picket line of a union of which he was not a member is not protected activity within the meaning of the Act.

(2) That Waugh's refusal to obey the order of his foreman and cross the picket line to perform his job was insub-

[2] Ruling on the admissibility of this evidence was reserved, and it is now admitted.

ordinate conduct and a violation of the so-called "partial strike doctrine."

(3) That Waugh's refusal to cross the picket line constituted a breach of contract in violation of the "no strike" clause contained in its collective bargaining agreement with the Newspaper and Mail Deliverers' Union of October 25, 1948.

(4) That decision and award of the Adjustment Board in accordance with grievance procedure outlined in the contract is conclusive and binding upon the Charging Party, and is a bar to exercise of jurisdiction by the National Labor Relations Board herein.

D. *The collective bargaining agreement*

The Respondent relies upon and is seeking to enforce a collective bargaining agreement dated October 25, 1948. That agreement recognized the Newspaper and Mail Deliverers' Union of New York and Vicinity as exclusive bargaining representative for Respondent's employees, provided procedure for the adjustment of grievances by an Adjustment Board, exclusive of other remedies, and contained a "no strike clause." Pertinent provisions of the contract read, as follows:

SECTION 1

1-a. Subject to the provisions hereinafter set forth, the Employer recognizes the Union as the exclusive representative for collective bargaining for all of its employees who perform all work in the delivery and handling of newspapers, magazines, periodicals, publications and merchandise in the operations performed

by the following: chauffeurs, distributors, route men, tiers, floor men, wrapper writers and relay men.

* * * * *

SECTION 2

2-a. The Union offers to furnish at all times and at regular time rates as many men as may be required by the Employer, such men to be competent and able to perform the particular operation for which they are required. If the Employer requires its regular employees to work in excess of a fifth shift, overtime at the rate of time and one-half shall be paid for the full shift.

2-b. The Employer agrees to employ only members of the Union thirty days following the effective date of this agreement, it being understood that any new employees employed after the effective date of this agreement as a regular situation holder be required to become members of the Union thirty days following the beginning of employment.

2-c. The parties hereto agree that when a definition or interpretation of the 30 day period has been handed down by law, then such definition or interpretation shall thereafter govern in so far as this contract is concerned.

SECTION 3

Mutual Guarantees

Because of the enactment of the Labor-Management Relations Act, 1947, this contract differs from its immediate predecessor and from contracts between these parties over a period of many years. Specifically, this

agreement eliminates closed shop, and references thereto because it no longer is permissible under the federal law. This provision is appended hereto as an appendix to, but not as a part of, this contract.

It is understood and agreed, however, for the duration of this contract, that if any provision as shown in the appendix hereto, and as modified from the preceding contract or excluded from this contract solely because of the restrictions of law, no longer is held to be inoperative, either by legislative enactment or by decision of the court of highest recourse, then such provision automatically shall become a part of this contract, to the extent permitted, and be in force and effect as though it had been originally made a part hereof.

To the best knowledge and belief of the parties this contract now contains no provision which is contrary to federal or state law or regulation. Should, however, any provision of this agreement, at any time during its life, be in conflict with federal or state law or regulation then such provision shall continue in effect only to the extent permitted. In event of any provision of this agreement thus being held inoperative, the remaining provisions of the agreement shall, nevertheless, remain in full force and effect.

It is mutually agreed that the spirit as well as the letter of this agreement is to be observed in full and that neither party will enter into any other agreement which in any way renders impossible or inoperative any provision of this contract.

* * * * *

APPENDIX

(Section number refers to prior contract)

2. The Union shall furnish at all times and at regular time rates as many men as may be required by the Wholesaler, such men to be competent and able to perform the particular operation for which they are required. If a Wholesaler requires his regular employees to work in excess of a fifth shift, overtime at the rate of time and one-half shall be paid for the full shift. When the Union fails to furnish such men promptly the Wholesaler is authorized to meet his needs by employing such men as he may be able to obtain; if the men so employed are not members of the Union they shall be employed only so long as the Union does not furnish members of the Union willing and qualified to take their places, but any man so employed shall be allowed to complete his day's work. Nothing herein contained is to be construed as conferring of power upon Wholesaler to fill a regular situation with anyone not a member of the Union.

* * * * *

SECTION 4

The Employer shall have the right to appoint as many foremen and assistant foremen as it may see fit and shall have the right of removal. The terms of a foreman or assistant foreman's employment, including hours, wages and other conditions of work, shall be a matter of agreement between the Employer and such foreman or assistant foreman, except that no foreman or assistant foreman shall be paid less than

the basic hourly rate agreed to herein. Present practice may be continued by the Employer as to foreman and assistant foreman performing any of the operations covered in Section 1 herein. Only the foreman or assistant foreman in charge shall be empowered to execute the provisions, terms and conditions hereof pursuant to the directions of the Employer, to issue orders, to hire or to discharge, and no one except the foreman or assistant in charge shall have the right, in accordance with such directions, to issue orders and make changes in working conditions. Any employees having a complaint to make with respect to the conduct or orders of a foreman or assistant foreman or with respect to alleged discrimination or other unfair treatment by the foreman or assistant foreman may take up such complaint with the person designated by the Employer for such purpose through the chapel chairman or other Union representative, and if such complaint is not satisfactorily disposed of, it may be submitted to the Adjustment Board. The Employer may make complaint that the Union has improperly imposed penalties upon foremen or assistant foremen for carrying out the orders or instructions of the Employer and if the complaint be not satisfactorily adjusted, the same may be submitted to the Adjustment Board.

* * * * * *

SECTION 12.

12-a. The right of the Employer, acting through a foreman or an assistant foreman at any time to discharge any employee for cause is hereby recognized. The cause shall be stated at the time of the discharge.

The discharged employee may, through his Union representative, make complaint with respect to his discharge to the Employer, and if such complaint be not satisfactorily adjusted, it may be submitted to the Adjustment Board. Pending adjustment and determination of such complaint the discharged employee need not be kept in employment by the Employer.

* * * * *

SECTION 13.

Any employee claiming to have been discharged without just cause or otherwise deprived of or injured with respect to any of the rights conferred upon him hereunder may have such claim taken up on his behalf with the Employer through the proper Union representatives, and in the event that such claim is not satisfactorily adjusted, the Union may submit the same to the Adjustment Board.

* * * * *

SECTION 19.

19-a. There is hereby created an Adjustment Board to function with the powers and duties herein conferred during the term hereof.

* * * * *

19-n. No strikes, lockouts or other cessation of work or interference therewith shall be ordered or sanctioned by any party hereto during the term hereof except as against a party failing to comply with a decision, award, or order of the Adjustment Board.

* * * * *

E. *Concluding findings*

1. Protected activities except as affected by an agreement authorized in Section 8 (a) (3) of the Act

It is of first concern to determine whether Charles Waugh refused to cross a *legitimate* picket line. I take judicial notice of a decision of the Board in *Nassau County Typographical Union #915 (AFL)*, 87 NLRB 1263, wherein it was held that said union was on October 22, 1947, and thereafter, the exclusive representative in the appropriate unit of employees of The Daily Review Corporation. There is no evidence that it has since lost its majority or been decertified by the Board. John J. Byrnes, vice president in charge, testified without contradiction that the picket line was established pursuant to a formal resolution of Typographical Union #915 in connection with a labor dispute of long standing. It is, therefore, concluded that the picket line was legitimate.

It has long been established by the Board and the courts that refusal to cross a legitimate picket line is a form of protected activity under Section 7 of the Act, and that a discharge therefor is violative of the Act as an unfair labor practice.[3] The fact that Waugh was not a member of the picketing union is immaterial.[4]

I do not agree with the contention of the Respondent that Waugh's conduct was illegal under the "partial strike doctrine" enunciated in a list of court decisions cited in its brief. All of those cases hold in substance that employees are not protected by the Act when attempting to accomplish

[3] *Illinois Bell Telephone Company*, 88 NLRB No. 191; *Cyril de Cordova & Bros.*, 91 NLRB No. 187.

[4] *Fafnir Bearing Co.*, 73 NLRB 1008; *New York Telephone Company*, 89 NLRB No. 45; *N. L. R. B. v. Montag Bros. Inc.*, 140 F. 2d 714.

an unlawful objective by unlawful methods, or even a lawful objective by illegal means. While remaining on the job, employees may not refuse to perform a part of the allotted task in defiance of reasonable instructions from the employer, nor unilaterally prescribe the terms upon which they will work. Not so in the present case. Waugh was not seeking an unlawful objective, but was clearly exercising the right of employees to assist a labor organization by utilizing a conventional method, time-honored in the history of the American labor movement. I cannot find from the evidence, as argued in Respondent's brief, that an effort was being made to exert pressure on his own employer to cease dealing with the *Review Star;* because Waugh was entirely willing to handle the newspapers if delivered to him beyond the picket line. Had he been engaged in a secondary boycott to force his employer to cease dealing in the products of The Daily Review Corporation, protection would in that case be afforded by the proviso of Section 8 (b) (4) of the Act, "That nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act." It seems to me that Waugh's being the only employee of the Respondent who refused to cross the picket line has no significance, since the rights under Section 7 of the Act may be exercised either individually or collectively.

I find, therefore, that Waugh's refusal to cross the picket line of the Typographical Union was protected activity except to the extent that such right may be affected by an

agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8 (a) (3) of the Act.

2. Effect of the agreement of October 25, 1948

The Respondent recognized the Newspaper and Mail Deliverers' Union as exclusive bargaining representative of its employees without the formality of an election. Such recognition was not in itself illegal, but all employers are precluded by the Act from entering into a contract containing the union-security provision which required as a condition of employment membership in the Newspaper and Mail Deliverers' Union on or after the thirtieth day following the effective date of said agreement. A contract with a labor organization, containing the aforesaid provision, is valid under the Act, only when two conditions have been complied with, to wit: (1) If such labor organization is the representative of the employees as provided in Section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made; and (2) if, following the most recent election held as provided in Section 9 (e) the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to authorize such labor organization to make such agreement.[5] In this case no union-shop election has been held in compliance with the proviso in Section 8 (a) (3) and the terms of Section 9 (e) of the Act. The union-security provision in the contract was not conditioned on ratification by such an election. Records of the Board disclose that the Newspaper and Mail Deliverers' Union filed UA petitions involving employees of the Respondent in December

[5] See first proviso in Section 8 (a) (3) of the Act.

1949, but on January 4, 1950, requested leave to withdraw them.[6] Incorporation of the union-security provision in the contract, under the circumstances of this case, is violative of the Act, whether or not it is enforced.[7]

It is well established that an unauthorized union-security provision is violative of Section 8 (a) (1), (2), and (3) and 8 (b) (2) of the Act, and that the contract in which it appears will be set aside by the Board.[8] The saving clause contained in section 2-c of the contract could not save the instant contract from illegality, because it does not expressly provide that the operation of the union-security provision was to be conditioned upon compliance with the provisions of Section 9 (e) of the Act.[9]

I shall hold, therefore, that the collective bargaining agreement of October 25, 1948, was illegally entered into by the Respondent, and cannot be utilized to restrain its employees in the exercise of the rights guaranteed in Section 7 of the Act. I do not decide whether Waugh's refusal to cross the picket line of Nassau Typographical Union #915 (AFL) would otherwise be a breach of the no-strike clause (19-n) contained in the contract.

Having held that the contract is illegal, it follows that the Board will not recognize any interpretation of its provisions by the Adjustment Board, or its decision and award attempting to enforce the terms thereof. It would not effec-

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[6] See: *Suburban Wholesalers, Inc.*, 2-UA-3690; and *Rockaway News Company*, 2-UA-5439-60.

[7] *C. Hager & Sons Hinge Mfg. Co.*, 80 NLRB 163.

[8] *Salant & Salant, Incorporated*, 87 NLRB 215; *Julius Resnick, Inc.*, 86 NLRB 38. Issues as to the validity of the identical instant contract are now pending before the Board in *Rockaway News Supply Company, Inc.*, 2-CA-617, 2-CB-190.

[9] *Schaefer Body, Inc.*, 85 NLRB 195; *Unique Art Manufacturing Co.*, 83 NLRB 1250; *Lykens Hosiery Mills, Inc.*, 82 NLRB 981.

tuate the policies of the Act to condone the unfair labor practices of the Respondent and the Newspaper Mail Deliverers' Union in entering into such a contract, by enforceing provisions in conflict with the rights of employees guaranteed in the Act. Motion of the General Counsel to strike the affirmative defense based upon enforcement of the contract, which is set forth in paragraphs 5, 6, 7, 8, and 9 of Respondents' answer to the complaint, is therefore granted.

I further find that the discharge of Charles Waugh by the Respondent was a continuation of unlawful support rendered to the Newspaper and Mail Deliverers' Union to encourage membership in that labor organization. On the other hand, it is apparent that the discharge of an employee for engaging in concerted activity with employees of another employer, and refusing to cross a legitimate picket line of their union, has a tendency to discourage membership in that labor organization. The discouraging effect in this case was evidenced by the appearance of placards on the picket line of Nassau Typographical Union #915 calling attention to the incident.

It is my conclusion that the Respondent engaged in, and is engaging in, unfair labor practices by discrimination in regard to the hire and tenure of employment of Charles Waugh to encourage or discourage membership in labor organizations.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of the Respondent set forth in Section III, above, occurring in connection with the operations of the Respondent described in Section I, above, have a close, inti-

mate, and substantial relation to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that the Respondent has engaged in an unfair labor practice, I shall recommend that it cease and desist therefrom, and take affirmative action in order to effectuate the policies of the Act.

I have found that the Respondent entered into an illegal agreement with the Newspaper and Mail Deliverers' Union, and that it should not be enforced against individual employees in restriction of the exercise of the rights guaranteed by Section 7 of the Act; but inasmuch as the charge and complaint herein is limited to a specific violation of Section 8 (a) (1) and (3) of the Act, I shall make no recommendations as to other violations, if any, concerning the contract of October 25, 1948.

Finding that the Respondent discharged Charles Waugh in violation of Section 8 (a) (1) and 8 (a) (3) of the Act, I shall recommend that the Respondent offer him immediate and full reinstatement to his former or substantially equivalent position,[10] without prejudice to his seniority or other rights and privileges, and that the Respondent make him whole for any loss of pay he may have suffered as a result of the discrimination by payment to him of a sum of money equal to the amount he would have earned from the date of his discharge to the date of offer of re-

[10] See: *The Chase National Bank of the City of New York, San Juan, Puerto Rico, Branch*, 65 NLRB 827.

instatement less his net earnings[11] to be computed on a quarterly basis in the manner established by the Board in *F. W. Woolworth Company,* 90 NLRB No. 41. Earnings in one particular quarter shall have no effect upon the back-pay liability for any other such period. It will also be recommended that the Respondent make available to the Board upon request payroll and other records to facilitate the checking of the amount of back pay due.

Upon the basis of the foregoing findings of fact, and upon the entire record in the case, I make the following:

CONCLUSIONS OF LAW.

1. Nassau County Typographical Union #915 (AFL), and Newspaper and Mail Deliverers' Union of New York and Vicinity are labor organizations within the meaning of Section 2 (5) of the Act.

2. By interfering with, restraining, and coercing their employees in the exercise of the rights guaranteed in Section 7 of the Act, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a) (1) of the Act.

3. By discriminating in regard to the hire and tenure of employment of Charles Waugh, thereby encouraging or discouraging membership in labor organizations, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a) (3) of the Act.

4. The aforesaid unfair labor practices are unfair labor practices within the meaning of Section 2 (6) and (7) of the Act.

[11] *Crossett Lumber Company,* 8 NLRB 440.

RECOMMENDATIONS.

Upon the basis of the foregoing findings of fact and conclusions of law, it is recommended that Rockaway News Supply Company, Inc., its agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Interfering with, restraining, or coercing its employees in the exercise of their right to join or assist the Newspaper and Mail Deliverers' Union of New York and Vicinity, or Nassau County Typographical Union #915 (AFL), or any other labor organization, and to engage in concerted activities for the purpose of mutual aid and protection, or to refrain from any or all of such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8 (a) (3) of the Act.

(b) Encouraging or discouraging membership in the Newspaper and Mail Deliverers' Union of New York and Vicinity, Nassau County Typographical Union #915 (AFL), or any other labor organization, by in any manner discriminating in regard to the hire or tenure of employment of its employees, or any term or condition of employment.

2. Take the following affirmative action which, it is found, will effectuate the policies of the Act:

(a) Offer to Charles Waugh immediate and full reinstatement to his former position, or to a substantially equivalent position, without prejudice to his seniority and other

rights and privileges, and make whole Charles Waugh for any loss of pay he may have suffered by reason of the discrimination against him, in the manner provided herein in the section entitled "The remedy."

(b) Post immediately at its places of business at 518 Rockaway Avenue in Valley Stream, Nassau County, New York, and at 45-35—36th Street, Long Island City, Queens County, New York, copies of the notice attached hereto, marked Appendix A. Copies of such notice, to be furnished by the Regional Director for the Second Region, after being duly signed by the Respondent's representative, shall be posted by the Respondent immediately upon receipt thereof and maintaind by it for sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for the Second Region (New York City) in writing within twenty (20) days from the date of the receipt of this Intermediate Report what steps the Respondent has taken to comply therewith.

It is further recommended that unless on or before twenty (20) days from the receipt of this Intermediate Report, the Respondent notify said Regional Director in writing that it will comply with the foregoing recommendations, the National Labor Relations Board issue an order requiring the Respondent to take the action aforesaid.

Dated at Washington, D. C., this 21st day of February, 1951.

LEE J. BEST,
Trial Examiner.

Appendix A Attached to Intermediate Report.

APPENDIX A.

NOTICE TO ALL EMPLOYEES

PURSUANT TO
THE RECOMMENDATIONS OF A TRIAL EXAMINER

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

WE WILL NOT encourage or discourage membership in the NEWSPAPER AND MAIL DELIVERERS' UNION OF NEW YORK AND VICINITY, or NASSAU COUNTY TYPOGRAPHICAL UNION #915 (AFL), or any other labor organization, by discriminating in any manner with regard to the hire and tenure of employment of our employees, or any term or condition of employment.

WE WILL NOT interfere with, restrain, or coerce our employees in the exercise of their right to join or assist the NEWSPAPER AND MAIL DELIVERERS' UNION OF NEW YORK AND VICINITY, or NASSAU COUNTY TYPOGRAPHICAL UNION #915 (AFL), or any other labor organization, to engage in concerted activities for the purpose of mutual aid or protection, or to refrain from any or all of such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the Act.

WE WILL OFFER Charles Waugh immediate and full reinstatement to his former or substantially equivalent

position without prejudice to any seniority or other rights and privileges previously enjoyed, and make him whole for any loss of pay suffered as a result of the discrimination.

WE WILL NOT discriminate in regard to hire or tenure of employment or any term or condition of employment against any employee because of membership in or activity on behalf of any such labor organizations.

All our employees are free to become, remain, or refrain from becoming members of the above-named unions or any other labor organization except to the extent that this right may be affected by an agreement in conformity with Section 8 (a) (3) of the Act, as amended.

ROCKAWAY NEWS SUPPLY COMPANY, INC.
(Employer)

Dated..... By.....
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

[1] **Stenographic Transcript of Testimony.**

BEFORE THE
NATIONAL LABOR RELATIONS BOARD
SECOND REGION.

In the Matter
of
ROCKAWAY NEWS SUPPLY COMPANY, INC.,
and
CHARLES WAUGH.

Case No. 2-CA-1342.

270 Broadway,
New York, New York,
Friday, December 1, 1950.

Pursuant to notice, the above-entitled matter came on for hearing at 10 o'clock a. m.

Before: Lee J. Best, Trial Examiner.

Appearances:

Helen F. Humphrey, Counsel for the General Counsel, National Labor Relations Board.

Hyman Waldman, Esq., 305 Broadway, New York, New York, appearing on behalf of the Charging Party.

Bandler, Haas & Kass, by: Julius Kass, Esq., of Counsel, 11 Broadway, New York, New York, appearing on behalf of the Respondent.

• • •

[3] PROCEEDINGS

* * *

[17] Miss Humphrey: Mr. Examiner, I have asked the Reporter to mark as General Counsel's Exhibit 2 for identification a stipulation on Commerce, which Mr. Kass has kindly agreed to enter into in the interest of expediting this proceeding, and to which I understand Mr. Waldman has no objection. I offer General Counsel's Exhibit No. 2 in evidence.

Trial Examiner Best: Let the stipulation be admitted, without objection.

(Stipulation on Commerce above referred to was marked General Counsel's Exhibit No. 2 for identification and received in evidence.)

* * *

[23] CHARLES M. WAUGH, a witness called by and on behalf of the General Counsel for the National Labor Relations Board, being first duly sworn, was examined and testified as follows:

* * *

[24] Direct Examination:

Q. (By Miss Humphrey)

* * *

Q. Have you been employed by Rockaway News Supply Company? A. I have been employed by them.

Q. For approximately how long were you employed by them, sir? A. Between seven years—approximately seven years.

Q. On what date did your employment terminate? A. It terminated on March 7th, 1950.

Q. Now, what duties were you performing at the time of the termination of your employment? What was your job title, sir? A. As chauffeur and routeman.

[25] Q. Was that characterized in any other fashion, that job? To refresh your recollection, were you a regular situation-holder? A. I was a regular situation-holder.

Q. Will you define what that means? A. A regular situation-holder means that if you are employed in a place more than five weeks, on a five-day a week basis, you automatically become under contract a steady situation-holder. In the job I hold, I held it through the right of seniority. Those jobs were put on the board for bids and through seniority rights under the contract, I automatically was able to pick one of these jobs and this was the job I was on at the time of discharge.

Q. In that job, was it necessary for you to shape for employment, or did you have a regularly assigned route, regularly assigned to you? A. I had a regular route, and time and days off assigned me.

Q. When I refer to shape, will you state for the record what is meant by that term in that industry? A. Well, shape means that if you appear on the premises of any publisher or news company for work, you took your place according to seniority, and you were employed according to senority, and you shape there if you are not a steady situation-holder.

Q. As you were at the time of your discharge? [26] A. As I was at the time of my discharge.

Q. How long had you been so employed as a regular situation-holder? A. I think it was approximately four years, approximately four years.

Q. Were you working days or nights at the time? A. I was working days at the time of discharge.

Q. And what hours were you working, sir? A. My hours were from 9:45 a. m., till 6:30 p. m.

Q. How many days a week were you working? A. That was five days a week, from Tuesday to Saturday.

Q. Now, referring to the time of your termination, will you state for the Examiner in some detail what your duties involved from the time you reported in the morning until you left at night? A. At 9:45 I appeared at the Rockaway News premises and I took a truck from the premises and went to the Nassau Daily Review Star. I arrived approximately at the Nassau Daily Review Star around 10 a. m. The Nassau Daily Review Star generally went to press at 10 o'clock a. m. I drew approximately about six loads of newspapers for the R view Star. I was under orders that if the Nassau Review Star did not go to press in time, I should leave there by 10:30 and proceed on with my next portion of my work, which was to go to the Newsday, in Hempstead, a newspaper called the [27] Newsday in Hempstead, and draw papers from there, which amounted to about 26 loads of papers, and then my next stop was the Floral Park Railroad Station and I would appear there about 11 o'clock and distribute to another route dealer portions of the load of the Newsdays and the Review Stars. At that point I would pick up New York Journals, and from that point on I would proceed and serve 17 dealers between Floral Park and Mineola, proper, in the town of Mineola.

That would dispense with all the papers that I had on the truck at the time.

From there on I would proceed to the Railroad Station at Freeport. There, there would be the Nassau Daily Review papers, the Journal, the Post, the Sun, the Telegram and the Newsday. Those are the papers I would take in my truck and distribute throughout North Bellmore, Bellmore,

Merrick, and then I would return—there was, I think, in that area, I had about 30 dealers to serve there. Each dealer would receive a portion of each paper that I had in the truck, hand-counted, and each dealer would get that portion, his order, whatever his order was of the individual papers. I would serve him directly.

From there, that would finish me up approximately around 2 a. m., 2 o'clock or 2:30. It all depends if the papers were on time. Then the next portion of my work was at 4:30. The Journals would arrive at Freeport Station.

[28] Q. That is the New York Journal? A. The New York Journal would arrive at the Freeport Station. We would wait then for the five o'clock train or the five minutes to five train, and we would have the Post, the Telegram and the Sun. Then I would deliver those papers to Roosevelt, North Merrick and Merrick, and then I would go right back to the main branch and my day's work was finished.

Q. How many days a week did you make a stop at the Nassau Daily Review Star? A. Four days a week. Saturday I did not have to stop at the Nassau Daily Review.

Q. Who was your immediate supervisor at the time of your discharge? A. The foreman who had immediate charge over me was a man named Mr. Gordon, Mr. W. Gordon, William Gordon.

Q. William Gordon? A. William Gordon.

Q. Do you know what his title was? A. Foreman on the day delivery.

Q. Now, directing your attention to the period immediately preceding March 7th, 1950, I ask you whether on any occasion you discussed with Mr. William Gordon daily deliveries of the Nassau Daily Review Star? A. On the—

Q. Just answer, did you have any conversations with him? A. Yes, I did.

[29] Q. Did you have one or more than one? A. I had more than one. I had two conversations.

Q. When did the first conversation occur? A. The first conversation occurred on Thursday morning.

Q. Thursday morning preceding your discharge? A. Preceding my discharge.

Q. That would be on Thursday morning, March 2nd? A. March the second.

Q. And where did this conversation take place? A. In the premises in the Rockaway News Supply Company in Valley Stream.

Q. Was anybody else there? A. No, there was nobody else present at the time.

Q. Will you state what was said by Mr. Gordon and by you on this occasion? A. I had found out, when I appeared for work at 9 o'clock—I generally get there a little early—when I appeared for work at 9 o'clock, the Shop Chairman had informed me that there was a picket line in front of the Nassau Review Star.

Q. When you say "Shop Chairman" what do you mean? A. He is the Chairman, the Union Chairman.

Q. What union is that, sir? A. The Newspaper and Mail Deliverers Union.

Q. Very Well,— A. He had informed me that there was a picket line in front of the Nassau Review Star.. So I immediately made inquiries [30] to find out whose picket line it was, and I was informed by Mr. Byrnes, who, to my knowledge, is a member of Local No. 915, International Typographical Union—

Q. Is that Mr. John Byrnes? A. Mr. John Byrnes—that there was a picket line, and that being familiar with

the Nassau Review labor troubles, I knew that—I asked him if it was a continuation of the same trouble that they had before. He informed me that it was, so, then, I immediately informed Mr. Gordon that under the circumstances, that it was my estimation it was a legal picket line, that I, as a union man, would not cross that union picketline and thereby become a scab or a strike-breaker. So Mr. Gordon told me that, "Charlie", he said, "I wouldn't take that attitude. It might mean your job." I said, "Mr. Gordon, if it means my job, I still have to maintain my right as a union man that I cannot harm another union, especially when they hold a legal picket line, which I know they do."

So after arguing pro and con on it, I said to him, "Why can't you go to your employer, Mr. Somyak, and ask him if he couldn't get papers delivered from the Nassau Review Star to the plant in Valley Stream, that is, in Rockville Center—the Nassau Review Star is in Rockville Center,—to the plant in Valley Stream, and then the union men would not have to cross that picket line?" Because it just happens [31] that quite often Mr. Somyak has to employ non-union men, or, if we have men that are sick, he takes men in other categories who are not union men and they do our work also.

So I said, "Under the circumstances, wouldn't it be advisable to take that method?"

Well, for the day—that was the Thursday—they did make arrangements so that I did not have to cross that picket line.

Q. What was done, Mr. Waugh? A. I don't know exactly who brought the papers down.

Q. Whom did you get the papers from or where did you get them? A. I received the papers on the premises in Valley Stream of the Rockaway News Supply Company.

Q. When you said "plant" a minute ago, did you mean the plant of the Rockaway News Supply Company in Valley Stream? A. That is what I meant. So that was Thursday. Then, as soon as I received the Nassau Review Stars, I went on my regular route for the day, which was the Newsdays and the Journals, and so forth.

The next day, which was Friday—

Q. That is Friday, March 3rd? A. March 3rd—I appeared at the office at the same time. I spoke to Mr. Gordon again. I says, "Has there been any arrangements made so that we don't have to cross that picket [32] line?"

So he said, "Well," he said, "I don't know", he said. "We will have to make some arrangements, I guess."

So that day they did make arrangements also to bring the papers down.

Q. What was done that you know of, that you saw? A. Well, I received papers that day from another union man and I asked him had there been any—am I getting ahead of my story? I am sorry, I am a little mixed up.

Q. Just tell us what happened on Friday, the 3rd, with reference to your receiving papers. A. On Friday, the 3rd, I appeared for work and I asked Mr. Gordon if there had been any arrangements made to take the papers down and he said to me—"We have not made any arrangements," so he said, "There's no picket line up there."

So I said, "Well, if there's no picket line up there I will draw the papers, but if there is a picket line up there, Mr. Gordon, I am not going to cross that picket line."

So he said, "Well", he says, "you will have to go up there and draw the papers."

So I said, "I will go up to Rockville Center, but if there

is a picket line, I will not cross the line." So Mr. Gordon and a man named Mr. Lunn, who works in the office—

Q. Do you know how to spell that name? A. L-u-n-n— followed me up in a private car, followed my [33] truck in a private car to Rockville Center. When we arrived at the premises of the Nassau Review Star, there was a picket parading up and down with a sign that Local No. 915 was picketing. So I told Mr. Gordon, I says, "Well, there's the picket. I can't go across the line". "But," I said, "if you want to," I says, "you take my truck, load it with papers and bring it back into the street and I will deliver the papers." And that was procedure as I stated.

Mr. Gordon took the truck across the picket line, put the six or seven bundles in the truck, drove the truck into the middle of the street, and then from there on I took the truck containing the newspapers and went about my daily work.

Q. Mr. Waugh, when did you next work in the regular course of duties after that Friday? A. Saturday morning was my next day of employment, and on Saturday there was no reason why—it wasn't part of my job to draw papers from the Nassau Review Star.

Q. Is that not published on that day? A. It is published on Saturdays.

Q. But your duties normally is not involved— A. My duties normally did not entail me to pick up papers at the plant of the Review Star.

Q. Do you know whether some other routeman picked them up on Saturday? A. I imagine they must.

[34] Q. You don't know? A. I don't know.

Q. All right, sir. Now when did you next work? A. The next day of my employment would be the start of the new week, which was Tuesday, March 7th.

Q. Now, would you state whether you had a conversation with Mr. Gordon on that day? A. When I arrived for work at around 9, 9:15, I asked the Chairman of the Shop—

Q. That is the Union Chairman? A. The Union Chairman of the shop, to go with me to Mr. Gordon's office as I thought possibly I might be in some trouble on account of the picket line.

Q. You just tell us what was said. A. So we went up to Mr. Gordon's office and I asked Mr. Gordon had there been any arrangements so we wouldn't have to cross the picket line. Mr. Gordon said definitely not. He said, "The Management wants you to cross that picket line."

So I said, "Mr. Gordon, I cannot accept that. You will have to say it as an order."

He said, "I order you to cross the Nassau Daily Review Star picket line up there and draw papers."

I said to him, "Or otherwise?"

He says, "Otherwise you are fired; if you refuse, you are fired."

[35] Q. What did you say? A. I said, "Mr. Gordon, I am very sorry", I said. "I will not cross that picket line. So I'm fired."

Q. Is that what you said? A. That is exactly what I said.

* * *

Q. * * * Now, what did you do after your conversation with Mr. Gordon? A. After my conversation with Mr. Gordon, I just left the premises.

Q. Now, thereafter, did you seek employment at the Rockaway [36] News Service? A. Yes, I did.

Q. When? A. I appeared there the following morning and I asked Mr. Gordon if he would hire me, and he said, "You know I can't hire you. You're fired."

So I said, "Well," I said, "I will appear tomorrow morning." So I did appear for approximately three weeks after that every morning and applied for work. Mr. Gordon knew I was there for work. Mr. Gordon told me more than once that he could not hire me.

Q. Now, Mr. Waugh, I ask you whether you participated in any activity for any labor organization on behalf of the employees of the Nassau Daily Review? A. Yes, I did.

Q. When? A. I believe the date was 1946. In 1946 I organized the District Managers of the Nassau Review Star. I brought them to my union and the Executive Council of our union, Newspaper and Mail Deliverers Union, which I am a member of, accepted the bargaining rights of those men. After a considerable length of time, we had an election of that bargaining group and the union lost the election by one vote. I was the man in charge of it—not as an official of the union, of the organization work, I should say—not as an official of the union, but as a member of the union interested in organization [37] work for the benefit of my union.

Q. How long have you been a member of a union, Mr. Waugh? A. I have been a member of the Newspaper and Mail Deliverers Union since 1927.

Q. Will you give your best estimate of the approximate time you customarily spent each day in picking up papers at the Nassau Daily Review Star? A. According to the office orders, I am limited to 30 minutes.

If the paper is not printed and delivered to me in 30 minutes, my orders are to proceed without them. Customarily it takes me anywheres from 5 to 10 minutes of the entire day's work just to pick up that Review Star at that point.

Q. And on those four days a week— A. That is only four days a week.

Miss Humphrey: No further questions, Mr. Examiner.

Trial Examiner Best: You may cross-examine.

CROSS-EXAMINATION:

Q. (By Mr. Kass) Mr. Waugh, on Thursday, when you reported at the shop of Rockaway for your regular job, you testified that the Shop Chairman told you there was a picket line at the Star; is that correct? A. That is quite correct.

Q. What was his name? A. That was Vincent Laplaca.

Q. Now, you then said that you found out from John Byrnes [38] that it was a Typo picket line? A. That's right.

Q. What means did you use to find out from John Byrnes? A. I am quite certain that I called him up. I called him up at his home.

Q. From the plant of Rockaway? A. No, not from the plant of Rockaway. From another place that I had to go. There was no public phone there.

Q. What time did you call John Byrnes? A. Around 9—between 9 and 9:30.

Q. In other words, you left the plant of Rockaway after reporting for work and went out and called John Byrnes; is that correct? A. My time for employment was 9:45.

Q. Will you please answer my question? A. Yes, I did.

* * *

[48] JOHN J. BYRNES: a witness called by and on behalf of the General Counsel for the National Labor Relations Board, being first duly sworn, was examined and testified as follows:

Direct Examination:

Q. (By Miss Humphrey) * * *

Q. Prior to your present employment, were you ever employed by the Nassau Daily Star Review? A. I was employed by the Nassau Daily Review Star.

[49] Q. The Review Star, thank you. A. For a period of approximately 17 years.

Q. When did your employment there terminate? A. There was a lock-out proclaimed by the Nassau County Typographical Union, No. 915, on November 9, 1947.

Q. Is that the last day on which you worked for the Nassau Daily Review Star? A. Yes.

Q. Are you a member of any labor organization? A. I am a member of the Nassau County Typographical Union No. 915, which is a subordinate union of the International Typographical union.

Q. How long have you been a member of that labor organization? A. About seven years.

Q. Do you hold any office in that organization at the present time? A. At the present time I am Vice President of the Nassau County Typographical Union.

Q. Heretofore, have you held other offices in that organization? A. Yes, a good many.

Mr. Kass: I object to it. It is immaterial.

Miss Humphrey: I think not, Mr. Examiner. I am qualifying the witness to testify on some matters on which there will be objection if he is not qualified.

[50] Trial Examiner Best: Go ahead.

A. I was President of that subordinate union during 1946, 1947 and 1948. I have been in charge of all strike and lockout activities of that union since 194[illegible] to the present time.

Q. Are you familiar with the history of labor relations between the Nassau Daily Review Star and Local No. 915? A. I am.

Q. That is subordinate Union No. 915? A. I am.

Q. Directing your attention to March 2nd, 1950, do you recall having a telephone conversation with Mr. Charles Waugh on that day? A. Yes.

Q. When did it occur? A. Sometime during the morning.

* * *

[55] Q. (By Miss Humphrey) Will you state the substance of the conversation, Mr. Byrnes? A. The substance of the conversation is like this: Mr. Waugh called me, "John, this is Charlie Waugh," he says. "Is that your picket line at the Review Star?"

I said, "Yes, it is."

He said, "Is it on the up-and-up, nothing wildcat about it?"

I said, "No, it is the same old lockout," and he said something like, "That's all I wanted to know," and hung up.

Q. Had, in fact, the picket line been maintained by No. 915 at the Nassau Daily Review Star? A. That was the second day of its maintenance.

Q. And it had been initiated on March 1st, then; is that correct? A. Yes.

Q. At whose direction had that picket line been established, sir? A. At the direction of the union.

J. J. Byrnes, for General Counsel, Direct.

Q. When you say "the Union", you mean No. 915? [56]
A. I mean Nassau County Typographical Union.

Q. Did Local No. 915 ever take any formal action which led to the initiation of that picket line? A. Well, yes. The formal action was the declaration of a lockout at the Review Star on November 9, 1947.

Q. A declaration by whom? A. By the Nassau County Typographical Union.

Q. Did that take any formal form, sir? Was it as a result of a motion or a resolution? A. Oh, yes. It was a formal resolution entered into at a union meeting on that day.

Q. Now, before the initiation of the picketing activity as such—well, let me ask you this question. I withdraw that.

Subsequent to this declaration of lockout which you have referred to, when were pickets first established at this paper? A. The first establishment of the pickets at the Nassau Daily Review Star was on March 1, 1950.

Q. Now when was the declaration of lockout, sir? A. November 9, 1947.

Q. Now, between November 9, 1947, and March 1, 1950, did 915 ever take any formal action which led to the initiation of the picket line? A. Well, I would say the motivating action which led to the [57] establishment of the picket line at that time was a resolution introduced at a union meeting in June.

Q. In June of what year, sir? A. 1949, moving that the lockout—

Mr. Kass: I object to the contents of the resolution.

Q. Do you have a copy of the resolution with you, sir? A. I have.

Q. Will you produce it? A. Yes.

Miss Humphrey: May we have a minute, off the record, sir?

Trial Examiner Best: Yes. Off the record.

(Discussion off the record.)

Trial Examiner Best: On the record.

Q. (By Miss Humphrey) Mr. Byrnes, I understand that you have in your possession a copy of the resolution of Local 915 to which you have referred orally? A. I have.

Q. Will you read it into the record, if you please, sir?

Trial Examiner Best: How long is that?

Miss Humphrey: It is not long, Mr. Examiner.

The Witness: It is a paragraph.

A. "Motion was regularly made and seconded that the lockout activities at the Review Star and at Griscom's be be renewed and revitalized by the officers of the Union. Motion carried. Breinlinger appointed Mr. Byrnes to carry out the Union's [58] decision in this motion."

Q. That was carried? A. That was carried.

Q. On what date? A. At a regular meeting on June 27, 1949.

Q. And yet no action was taken pursuant to that in maintaining a picket line? A. No, in maintaining a picket line, no.

Q. Was other action taken pursuant to that resolution prior thereto? A. Yes, other publicity activities—

Mr. Kass: I object to it.

Miss Humphrey: All right, I will withdraw it.

Q. (By Miss Humphrey) Now, how long has that picket line been maintained? A. To the present date. It is still being maintained.

* * *

[65] Q. Did your union ever engage in negotiations with the Nassau Review Corporation since the date of that decision? A. Yes, on many occasions.

Q. You, as Vice President, are familiar with those negotiations? A. I am.

Q. To your knowledge, has the Nassau Review Corporation ever questioned the majority of the International Typographical Union, No. 915, as representative of its employees in the unit set forth in that decision? A. They never have questioned our majority.

* * *

[68] Q. (By Miss Humphrey) Mr. Byrnes, I ask you whether subsequent to the discharge of Mr. Waugh any picket signs were ever displayed by Subordinate Union No. 915, which referred to Mr. Waugh? [69] A. Yes.

Q. Where were those picket signs maintained? A. At the picket line in front of the Nassau Daily Review Star.

Q. When were they maintained? A. I would say they were maintained on March 8th and 9th.

Q. Give us the substance of what they said. A. The exact wording of the signs was this: "Is Waugh the only union mail deliverer?"

Miss Humphrey: No further questions.

CROSS EXAMINATION:

Q. (By Mr. Kass) Now, Mr. Byrnes, what was the reason for those picket signs? A. Well, the action of the Mail Deliverers crossing our picket line was doing the morale of my own union no good.

Q. In other words, all of the mail deliverers— A. I hadn't finished my answer.

Q. Excuse me. A. It also was demonstrating the ineffectiveness of our picket line.

* * *

[70] Mr. Kass: The succeeding question is: In other words, all of the other drivers were crossing the picket line; is that right?

Mr. Waldman: I object to that question.

Trial Examiner Best: I think under the circumstances he is entitled to answer, in explanation of the sign.

A. I don't know that all the other union drivers were crossing. I don't know which of them were union and which of them were non union. I do know that some of them who were union were crossing.

Q. The Rockaway trucks were crossing the picket line; is that correct? [71] A. That is true.

* * *

[73] Q. And at the time you ordered the signs prepared, the only union mail deliverer that you knew that was not crossing was Mr. Waugh; is that correct? A. That is true.

* * *

[95] Trial Examiner Best: All right. In view of the previous ruling about the motion made by the General Counsel to dismiss the additional defense, the Trial Examiner will admit the introduction of the original contract, with the agreement of the General Counsel that photostatic copies may be substituted and the original withdrawn. The General Counsel may have an exception noted to the contract, on her objection to its materiality.

Mr. Kass: May the exhibit be marked, sir?

Trial Examiner Best: The exhibit may be identified and received in evidence.

(Thereupon the document above referred to was marked Respondent's Exhibit No. 1 for identification and received in evidence.)

* * *

J. Somyak, for Respondent, Direct.
General Counsel's Exhibit 2.

[99] JOHN SOMYAK a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

* * *

Direct Examination:

Q. (By Mr. Kass) * * *

[101] Q. And can you tell us what other papers you are the distributor for? A. Practically all the English language papers and also the foreign papers.

Q. Can you name them, sir? A. Well, the New York Times, the Herald-Tribune, Daily News, the Daily News Portion of Long Island, the Mirror, the American, Journal-American, Telegram, the Sun, the World-Telegram, the Evening Post, Nassau Review, the Long Island Daily—the Newsday, and all the foreign papers. I can't enumerate those.

General Counsel's Exhibit 2.

STIPULATION ON COMMERCE

The following facts are stipulated and agreed by and between the undersigned and this Stipulation may be introduced and received in evidence in a hearing to be conducted by the National Labor Relations Board with the same force and effect as if properly qualified witnesses were called before the National Labor Relations Board and gave under oath sufficient and competent evidence as to each of the facts set forth, without prejudice to the right of the National Labor Relations Board or any party here-

General Counsel's Exhibit 2.

to to offer oral testimony or evidence as to any matter relevant to the issues in this proceeding:

1. Rockaway News Supply Company, hereinafter referred to as Respondent, is a corporation duly organized under and existing by virtue of the laws of the State of New York.

2. At all times mentioned herein Respondent has maintained its principal office and place of business at 518 Rockaway Avenue, Valley Stream, Nassau County, New York and a place of business at 45-35—36th Street, Long Island City, Queens County, New York where it has been continuously engaged in the purchase, sale, distribution and delivery of newspapers, magazines and periodicals including the New York Times, the New York Herald Tribune, the Daily News and the Daily Mirror to various stores, newsdealers and other retail distributors at various locations in the State of New York.

3. The publisher of each of the publications named in paragraph 2 above has used and continues to use one or more of the wire services known as the Associated Press, the United Press, and the International News Service; each of such publishers has, during the past year, caused to be shipped in interstate commerce from its respective New York plant to states of the United States other than the State of New York newspapers valued at in excess of $25,000; and each such publisher is an instrumentality and channel of interstate commerce.

4. During the past year Respondent, in the course and conduct of the operations described in paragraph 2 above, performed services valued at in excess of $50,000 in the distribution of the publications named therein.

Excerpts from Respondent's Exhibit 1.

Respondent concedes that it is engaged in interstate commerce within the meaning of the National Labor Relations Act.

Dated: New York, New York November 9, 1950.

ROCKAWAY NEWS SUPPLY COMPANY, INC.

By JULIUS KASS, Atty.

HELEN F. HUMPHREY
Helen F. Humphrey
Counsel for the General Counsel
National Labor Relations Board
Second Region
2 Park Avenue
New York 16, New York

Excerpts from Respondent's Exhibit 1.

AGREEMENT made this 25th day of October, 1948, by and between ROCKAWAY NEWS SUPPLY COMPANY, INC., hereinafter called the "Employer" and NEWSPAPER AND MAIL DELIVERERS' UNION OF NEW YORK AND VICINITY, hereinafter called the "Union" for and in behalf of the Union.

WITNESSETH:

That in consideration of the mutual promises exchanged herein, the parties hereto agree as follows:

SECTION 1

1-a. Subject to the provisions hereinafter set forth, the Employer recognizes the Union as the exclusive represen-

tative for collective bargaining for all of its employees who perform all work in the delivery and handling of newspapers, magazines, periodicals, publications and merchandise in the operations performed by the following: chauffeurs, distributors, route men, tiers, floor men, wrapper writers and relay men.

* * *

SECTION 2

2-a. The Union offers to furnish at all times and at regular time rates as many men as may be required by the Employer, such men to be competent and able to perform the particular operation for which they are required. If the Employer requires its regular employees to work in excess of a fifth shift, overtime at the rate of time and one-half shall be paid for the full shift.

2-b. The Employer agrees to employ only members of the Union thirty days following the effective date of this agreement, it being understood that any new employees employed after the effective date of this agreement as a regular situation holder be required to become members of the Union thirty days following the beginning of employment.

SECTION 3

Mutual Guarantees

* * *

To the best knowledge and belief of the parties this contract now contains no provision which is contrary to federal or state law or regulation. Should, however, any

provision of this agreement; at any time during its life, be in conflict with federal or state law or regulation then such provision shall continue in effect only to the extent permitted. In event of any provision of this agreement thus being held inoperative, the remaining provisions of the agreement shall, nevertheless, remain in full force and effect.

* * *

SECTION 19

19-a. There is hereby created an Adjustment Board to function with the powers and duties herein conferred during the term hereof.

* * *

19-d. In addition to all the matters herein expressly provided for which may be submitted to the Adjustment Board, such Board shall have the power to hear and determine all questions that may arise with respect to the interpretation or application of any of the provisions hereof or with respect to any of the relations between the Union or any of its members and the Employer, or with respect to any other thing germane to the subject matter hereof and the purposes thereof though not expressly provided for or dealt with herein.

* * *

19-n. No strikes, lockouts or other cessation of work or interference therewith shall be ordered or sanctioned by any party hereto during the term hereof except as against a party failing to comply with a decision, award, or order of the Adjustment Board.

* * *

BATAVIA TIMES PUBLISHING CO., BATAVIA, N. Y.
12-21-51-75

In the United States Court of Appeals for the Second Circuit

No. 208

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

ROCKAWAY NEWS SUPPLY COMPANY, INC., RESPONDENT

Answer to petitioner for enforcement of an order by the National Labor Relations Board

January 17, 1952

To the Honorable, the Justices of the United States Court of Appeals for the Second Circuit:

Rockaway News Supply Company, Inc., respectfully answers the petition for enforcement submitted in the above matter by the National Labor Relations Board on the 15th day of January 1952.

The respondent respectfully admits all of the allegations of the petition except that it denies that it committed any unfair labor practice as stated in the petition, Paragraph "1," and in the order recited under Paragraph "2," and, therefore, states that this Court must deny enforcement of the said order and further respectfully shows:

1. That the National Labor Relations Board was at all times relevant to the proceedings hereto and still is without jurisdiction to have issued the complaint herein by virtue of the fact that the alleged violation was a grievance under the existing collective bargaining agreement which was arbitrated by the charging
64 party and the respondent in conformance with the provisions of the collective bargaining agreement and that the discharge of the charging party was for cause.

Wherefore, the respondent prays this Honorable Court that they cause notice of the filing of this answer and a copy thereof to be served upon the petitioner and that it deny enforcement of the order set forth in Paragraph "2" of the petition in its entirety and for such other and further relief as to the Court may seem just and equitable in the premises.

Dated New York, N. Y., January 17, 1952.

ROCKAWAY NEWS SUPPLY COMPANY, INC.,
By BANDLER, HAAS & KASS,
By JULIUS KASS, A PARTNER,
BANDLER, HAAS & KASS,
Attorneys for Respondent.

232642—52—2

65 Before the National Labor Relations Board, Second Region

Case No. 2-CA-1342

IN THE MATTER OF ROCKAWAY NEWS SUPPLY COMPANY, INC. AND CHARLES WAUGH

65 *Testimony*

270 BROADWAY,
NEW YORK, NEW YORK,
Friday, December 1, 1950.

Pursuant to notice, the above-entitled matter came on for hearing at 10 o'clock a. m.

Before LEE A. BEST, Trial Examiner.

Appearances

Helen F. Humphrey, Counsel for the General Counsel, National Labor Relations Board. Hyman Waldman, Esq., 305 Broadway, New York, New York, appearing on behalf of the Charging Party. Bandler, Haas & Kass, 11 Broadway, New York, New York, appearing on behalf of the Respondent. By Julius Kass, Esq., of Counsel.

66 [23] CHARLIE M. WAUGH, a witness called by and on behalf of the General Counsel for the National Labor Relations Board, being first duly sworn, was examined and testified as follows:

* * * * * *

[29] A. I had found out, when I appeared for work at 9 o'clock—I generally get there a little early—when I appeared for work at 9 o'clock, the Shop Chairman had informed me that there was a picket line in front of the Nassau Review Star.

Q. When you say "Shop Chairman" what do you mean?—A. He is the Chairman, the Union Chairman.

Q. What union is that, sir?—A. The Newspaper and Mail Deliverers Union.

Q. Very well.—A. He had informed me that there was a picket line in front of the Nassau Review Star. So I immediately made inquiries [30] to find out whose picket line it was, and I was informed by Mr. Byrnes, who, to my knowledge, is a member of Local No. 915, International Typographical Union——

Q. Is that Mr. John Byrnes?—A. Mr. John Byrnes—that there was a picket line, and that being familiar with the Nassau Review labor troubles, I knew that—I asked him if it was a continuation of the same trouble that they had before. He informed me that it was, so, then, I immediately informed Mr. Gordon that under the

circumstances, that it was my estimation it was a legal picket line, that I, as a union man, would not cross that union picket line and thereby become a scab or a strikebreaker. So Mr. Gordon told me that, "Charlie," he said, "I wouldn't take that attitude. It might mean your job." I said, "Mr. Gordon, if it means my job, I still have to maintain my right as a union man that I cannot harm another union, especially when they hold a legal picket line, which I know they do."

67 So after arguing pro and con on it, I said to him, "Why can't you go to your employer, Mr. Somyak, and ask him if he couldn't get papers delivered from the Nassau Review Star to the plant in Valley Stream, that is, in Rockville Center—the Nassau Review Star is in Rockville Center—to the plant in Valley Stream, and then the union men would not have to cross that picket line?" Because it just happens [31] that quite often Mr. Somyak has to employ nonunion men, or, if we have men that are sick, he takes men in other categories who are not union men and they do our work also.

* * * * *

A. That is what I meant. So that was Thursday. Then, as soon as I received the Nassau Review Stars, I went on my regular route for the day, which was the Newsdays and the Journals, and so forth.

The next day, which was Friday——

Q. That is Friday, March 3rd?—A. March 3rd—I appeared at the office at the same time. I spoke to Mr. Gordon again. I says, "Has there been any arrangements made so that we don't have to cross that picket [32] line?"

So he said, "Well," he said, "I don't know," he said. "We will have to make some arrangements, I guess."

So that day they did make arrangements also to bring the papers down.

Q. What was done that you know of, that you saw?—A. Well, I received papers that day from another union man and I asked him had there been any—am I getting ahead of my story? I am sorry, I am a little mixed up.

Q. Just tell us what happened on Friday, the 3rd, with reference to your receiving papers.—A. On Friday, the 3rd, I appeared for work and I asked Mr. Gordon if there had been any arrangements made to take the papers down and he said to me—"We have not made any arrangements," so he said, "There's no picket line up there."

68 So I said, "Well, if there's no picket line up there, I will draw the papers, but if there is a picket line up there, Mr. Gordon, I am not going to cross that picket line."

So he said, "Well," he says, "you will have to go up there and draw the papers."

So I said, "I will go up to Rockville Center, but if there is a picket line, I will not cross the line." So Mr. Gordon and a man named Mr. Lunn, who works in the office——

Q. Do you know how to spell that name?—A. L-u-n-n followed me up in a private car, followed my [33] truck in a private car to Rockville Center. When we arrived at the premises of the Nassau Review Star, there was a picket parading up and down with a sign that Local No. 915 was picketing. So I told Mr. Gordon, I says, "Well, there's the picket. I can't go across the line." "But," I said, "if you want to," I says, you take my truck, load it with papers and bring it back into the street and I will deliver the papers." And that was the procedure as I stated.

Mr. Gordon took the truck across the picket line, put the six or seven bundles in the truck, drove the truck into the middle of the street, and then from there on I took the truck containing the newspapers and went about my daily work.

* * * * *

Q. Do you know whether some other routeman picked them up on Saturday?—A. I imagine they must.

* * * * *

[34] So we went up to Mr. Gordon's office and I asked Mr. Gordon had there been any arrangements so we wouldn't have to cross the picket line. Mr. Gordon said definitely not. He said, "The Management wants you to cross that picket line."

So I said, "Mr. Gordon, I cannot accept that. You will have to say it as an order."

He said, "I order you to cross the Nassau Daily Review Star picket line up there and draw papers."

69 I said to him, "Or otherwise?"

He says, "Otherwise you are fired; if you refuse, you are fired." [35]

Q. What did you say?—A. I said, "Mr. Gordon, I am very sorry," I said. "I will not cross that picket line. So I'm fired."

Q. Is that what you said?—A. That is exactly what I said.

* * * * *

[37] CROSS-EXAMINATION

* * * * *

[40] Q. Well, now, were there any other men also assigned to the job of getting papers from the Nassau Star Review?—A. Yes; there were.

Q. How many other men were doing work similar to yours?—A. I was the only one doing that type of work.

Q. How many other men were supposed to go to the Nassau Star Review that day to pick up papers?—A. Five men.

Q. In addition to yourself?—A. I believe it is five in addition to myself.

Q. And were those five men union men?—A. Yes; they were union men.

Q. And to your knowledge, did those five men do their job?

* * * * *

[42] Q. The papers were brought out to you for delivery to the customers?—A. That's right.

Q. Who brought them out to you?—A. I don't quite remember.

Q. Was it Mr. Gordon?—A. On Friday, it was Mr. Gordon.

Q. On Thursday, who was it?—A. I said I don't remember.

70 Q. And you made delivery of those papers?—A. Correct.

Q. So that actually you did not object to delivering papers from a strike-bound plant; is that correct?—A. No.

Q. You only objected to your crossing the picket line?—A. Exactly.

* * * * *

[43] Q. But you did not object to delivering papers that were given to you by another union man who had crossed the picket line?—A. No.

* * * * *

[48] JOHN J. BYRNES, a witness called by and on behalf of the General Counsel for the National Labor Relations Board, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

* * * * *

[58] A. A day or so after I learned of Mr. Waugh's discharge, at my direction, picket signs were printed carrying the following [59] legend——

"Mr. KASS. I object to the testimony and move that it be stricken."

* * * * *

[63] I offer to prove by this witness, if he were permitted to answer the question directed to him, that he would testify that beginning on March 10th, and for approximately two days thereafter, picket signs were carried before the Nassau Daily Star Review which read, "Is Waugh the only union mail deliverer?" or words to that effect. That is my offer of proof, Mr. Examiner.

* * * * *

71 By Miss HUMPHREY:

[68] Q. Mr. Byrnes, I ask you whether subsequent to the discharge of Mr. Waugh any picket signs were ever displayed by Subordinate Union No. 915, which referred to Mr. Waugh? [69]—A. Yes.

Q. Where were those picket signs maintained?—A. At the picket line in front of the Nassau Daily Review Star.

Q. When were they maintained?—A. I would say they were maintained on March 8th and 9th.

Q. Give us the substance of what they said.—A. The exact wording of the signs was this: "Is Waugh the only union mail deliverer?"

* * * * * *

CROSS-EXAMINATION

* * * * * *

Q. In other words, all of the mail deliverers' drivers were crossing the picket line?

—Mr. WALDMAN. I object to that.

Q. (Continuing.) With the exception of Mr. Waugh.

* * * * * *

[70] Trial Examiner BEST. Why don't you just ask the witness what their reasons for having those picket signs were with Waugh's name on them?

Mr. KASS. I have already asked that and now I am entitled to ask the succeeding question.

Trial Examiner BEST. What is the succeeding question?

Mr. KASS. The succeeding question is: In other words, all of the other drivers were crossing the picket line; is that right?

* * * * * *

A. I don't know that all of the other union drivers were crossing. I don't know which of them were union and
72 which of them were nonunion. I do know that some of them who were union were crossing.

Q. The Rockaway trucks were crossing the picket line; is that correct? [71]—A. That is true.

Q. And to your knowledge, the only mail deliverers union driver who wasn't crossing was Waugh.

* * * * * *

[73] Q. And at the time you ordered the signs prepared the only union mail deliverer that you knew that was not crossing was Mr. Waugh; is that correct—A. That is true.

* * * * * *

[94] Mr. KASS: Mr. Examiner, I now offer into evidence the contract between Rockaway News Supply Company, Inc., and Newspaper and Mail Deliverers Union of New York and Vicinity, dated the 25th of October 1948, the contract currently in effect between the collective bargaining agency and the Respondent; for the purpose of saving cost, I would like to request permission of the attorney for the General Counsel to read into the record the pertinent provisions of the contract rather than introduce the entire contract itself.

* * * * * *

[96] Mr. KASS. (Reading.) "The undersigned, constituting the members of the Board of Adjustment, designated in accordance with the agreement between the parties, having [97] heard the proof and allegations, award as follows: Under Section 4 of the agreement between the parties, it is the obligation of an employee to comply with orders of the foreman, and if such orders are objectionable to him personally, to have the issues discussed and brought to arbitration in accordance with the procedure set forth therein. He may not, in the first instance, refuse to obey the order merely because it is personally distasteful to him, unless it is the type of order which might subject him to physical danger or be contrary to public policy.

"Of course, the order which the employee here refused to obey cannot be held to have been against public policy (and concededly it does not physically endanger him) particularly since the union had knowingly refrained from taking any position and the act required was willingly performed without objection by six other employees who were members of the union. In addition, the contract between the parties does not specifically permit the refusal by the employee to comply with such an order although other contracts in the industry do contain such a provision.

"Consequently it must be ruled that the act of Charles Waugh in refusing to obey the order of the foreman on March 7, 1950, constituted just cause for discharge. Signed, I. Robert Feinberg, Impartial Chairman; John Somyak, John Fylstra." [98]

Thereunder is stated "The members of the Adjustment Board designated by the Union dissent from this award, dated, New York, New York, March 31, 1950."

* * * * * *

[99] JOHN SOMYAK, a witness called by and on behalf of the respondent, being first duly sworn, was examined and testified as follows:

* * * * * *

DIRECT EXAMINATION

* * * * *

[102] Q. One moment, now. With reference to that negotiation do you recall any demand made by the union with reference to the question of work stoppages and the right of people to refuse to cross a picket line?

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Miss HUMPHREY. Objection, Mr. Examiner.

Mr. WALDMAN. I join in the objection.

Trial Examiner BEST. Objection sustained. The contract speaks for itself.

Mr. KASS. At this time, sir, we offer to prove that during the course of this negotiation, one of the demands made by the union was a clause in the contract with reference to work stoppages which would have said, "No man shall be required to cross a picket line," and that during the course of these negotiations that clause was rejected by the respondent and the union thereby acquiesced in the rejection of that clause and consented to the no strike clause contained in Respondent's Exhibit 1.

Trial Examiner BEST. All right. Let the offer of proof appear in the record.

* * * * *

[103] CROSS-EXAMINATION

* * * * *

[105] Mr. KASS. I object to it on the ground that that is not the best evidence of the invocation of the proceedings which resulted in the arbitration proceeding, and I offer to stipulate on behalf of the respondent that by virtue of a letter dated March 16, 1950, from Samuel Duker, attorney for the union, addressed to I. Robert Feinberg, Esq., 25 West 44th Street, New York, New York, as follows:

"DEAR MR. FEINBERG. The Newspaper and Mail Deliverers' Union hereby files a grievance against the Rockaway News Supply Company, Inc., by reason of the unlawful discharge of one Charles Waugh, an employee and member of the union. Reinstatement with back pay are hereby requested. The union waives a hearing by the Four-man Board and requests a hearing by the Five-man Board. Very truly yours, Samuel Duker."

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* * * * *

[107] Q. Do you know, sir, whether or not in this particular case the union initiated this arbitration? Do you know it?—A. I think they did. [108]

Q. So that when you said, "I don't know," you withdraw your answer that you don't know and now you say that the union did initiate this arbitration?—A. That letter refreshes my memory.

* * * * *

Respondent's exhibit No. 1.

19–e. Any matter which may come before the Adjustment Board, as herein provided, shall be deemed automatically to have been submitted to the Board with full power in the Board to act thereon forty-eight hours (Sunday and Legal Holidays excepted) after the same has arisen, unless satisfactorily adjusted within that time between the Union and the Employer, or unless such time shall have been extended in writing by the Impartial Chairman.

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1951

No. 208

Argued April 10, 1952. Decided May 12, 1952

Docket No. 22252

NATIONAL LABOR RELATIONS BOARD, PETITIONER

against

ROCKAWAY NEWS SUPPLY CO., INC., RESPONDENT

Before: CHASE, MARIS and CLARK, *Circuit Judges*

On Petition for Enforcement of an Order of the National Labor Relations Board

George J. Bott, General Counsel, *David P. Findling*, Associate General Counsel, *A. Norman Somers*, Assistant General Counsel, *Frederick U. Reel*, and *Marvin E. Frankel*, Attorneys, National Labor Relations Board, for Petitioner.

Bandler, Haas & Kass, for Respondent.

MARIS, *Circuit Judge:*

This is a petition to enforce an order of the National Labor Relations Board. The Board found that respondent, Rockaway News Supply Co., Inc., had violated Sections 8(a)(1) and (3) of the National Labor Relations Act by discharging an employee because of his refusal to cross a picket line at a plant which his duties required him to enter. The undisputed facts upon which this finding is based may be summarized as follows:

Charles Waugh, the employee whose discharge on March 7, 1950, gives rise to this proceeding, had been employed by respondent as a chauffeur and routeman for about seven years. He was a member of the Newspaper and Mail Deliverers' Union of New York and Vicinity, which had for some years been contractually recognized by respondent as the exclusive bargaining representative of its employees. Working five days a week (Tuesdays through Saturdays), from 9:45 a.m. to 6:30 p.m., Waugh's duties consisted of driving a truck along a regularly assigned route and picking up and delivering various newspapers and other publications. Among his scheduled stops was one at the plant of The Daily Review Corporation, Rockville Center, Long Island, New York, publisher of the Nassau Daily

Review Star. Before 10:30 a.m. on each working day, except Saturday, Waugh was required to pick up a supply of Review Stars for delivery at subsequent points on his route. This operation consumed about 10 or 15 minutes of each day.

On the morning of Thursday, March 2, 1950, before beginning work, Waugh learned that the Nassau County Typographical Union had placed pickets before the premises of The Daily Review Corporation. He then went to his foreman and told him that he, as a union man, would not cross that union picket line and thereby become a "scab" or a strikebreaker. The foreman suggested that he should not take that attitude, it might mean his job. But Waugh reiterated his position and suggested that copies of the Review Star be brought out to him in some way which would not entail his crossing the picket lines.

Respondent arranged to have its consignment of Review Stars brought out on that day to its plant at Valley Stream, from which point Waugh took them and proceeded on his route as usual. Again on the next day, Friday, March 3, respondent had the papers brought by another of its employees to Waugh outside the picket line. On Tuesday, March 7, however, the next day on which Waugh's duties included picking up copies of the Review Star, his foreman told him that arrangements like those of the preceding Thursday and Friday would not be made and that respondent expected him to cross the picket line. "Otherwise," said the foreman, "you are fired; if you refuse, you are fired." Persisting in his refusal to cross the picket line, Waugh left respondent's premises. On the following day, Waugh returned seeking to be rehired but the foreman told him that he couldn't hire him, he had been fired. On each succeeding day for about three weeks Waugh appeared at the respondent's plant but was not rehired.

On April 7, 1950 Waugh filed a charge and on November 8, 1950 the General Counsel of the Board issued a complaint against the respondent. After a hearing before a trial examiner and an intermediate report by him the Board filed its decision holding that Waugh had a right, guaranteed by Section 7 of the Act, to refuse to cross the picket line and that accordingly his discharge was in violation of Sections 8(a)(1) and (3) of the Act. Accordingly the Board entered an order which required respondent to cease and desist from (1) interfering with, restraining, or coercing its employees in the exercise of their right to assist the Typographical Union, or any other labor organization, and their right to engage in, or refrain from, other concerted activities and (2) discouraging activity on behalf of and membership in the Typographical Union or any other labor organization, by discriminating in regard to the hire or tenure of its employees. Affirmatively, the order required respondent to reinstate Waugh with back pay, to make available to the

Board necessary records bearing on Waugh's right to reinstatement and back pay, and to post appropriate notices. 95 N. L. R. B.

It will thus be seen that this case squarely presents the question whether it is an unfair labor practice for an employer to discharge an employee who refuses to obey the employer's orders to perform that part of his regular daily duties which involve his crossing the picket line of another union than his own at another plant than that of his employer. In considering this question we accept the contention of the Board that the refusal of an employee to cross a picket line of another union than his own at another plant than that of his employer is an exercise of "the right to * * * assist labor organizations * * * and to engage in other concerted activities for the purpose of * * * mutual aid or protection," which is expressly guaranteed by Section 7 of the Act. Such refusal to cross a picket line is habitual with union workers as this court has recently pointed out,[1] it is frequently of assistance to the labor organization whose picket line is respected, and it is in a broad but very real sense directed to mutual aid or protection.[2] But accepting the proposition that the refusal of an employee to cross a picket line is a right guaranteed by Section 7 of the Act does not answer the question which this case poses. For, as the Supreme Court pointed out in *Republic Aviation Corp.* v. *Board*, 1945, 324 U. S. 793, 798:

> "Like so many others, these rights are not unlimited in the sense that they can be exercised without regard to any duty which the existence of rights in others may place upon employer or employee."

It was in recognition of this limitation upon the rights guaranteed by Section 7 that the Board itself in its decision in *Peyton Packing Company, Inc.*, 1943, 49 N. L. R. B. 828, 843, said:

> "The Act, of course, does not prevent an employer from making and enforcing reasonable rules covering the conduct of employees on company time. Working time is for work. It is therefore within the province of an employer to promulgate and enforce a rule prohibiting union solicitation during working hours. Such a rule must be presumed to be valid in the absence of evidence that it was adopted for a discriminatory purpose."

It is true that in the *Peyton Packing Company* case the Board found that the union solicitation for which the employees were dis-

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[1] *National Labor Rel. Bd.* v. *Service Trade Chauffeurs, etc.*, 2 Cir., 1951, 191 F. 2d 65, 68.

[2] *National Labor Rel. Bd.* v. *Peter C. K. Swiss Choc. Co.*, 2 Cir., 1942, 130 F. 2d 503, 505-506.

charged, although occurring on the company's premises, had taken place on the employee's time before or after work or during luncheon or rest periods and not during their working time. It accordingly held their discharges to be in violation of Section 8(1) of the Act. The distinction which the Board has thus made between an employee's activities on his own time, even though on his employer's premises, and his activities during his actual working time is a sound and reasonable one and has been upheld by the courts.[3]

In the cases to which we have referred the distinction between union activities by an employee during working time in violation of the employer's rules and such activities on the employee's own time was applied to the soliciting of union memberships in the plant. The right to assist a union of which one is not a member by refusing to cross its picket line is certainly of no higher dignity or importance to the individual than the right to ask his fellow workers in his own plant to join with him in the union of which he is a member in concerted activities which will directly protect or aid in promoting their common interests. We think that the former is subject to the same limitations as the latter. In other words an employee is of course free to exercise his right to refuse to cross a picket line when he is on his own time and his discharge for so doing would doubtless be a violation of Section 8(a)(1). But he is not free to exercise the right during his working time in violation of his employer's working rules by refusing to perform that part of his regular duties which requires him to cross the picket line.[4] To hold otherwise would be to permit an employee unilaterally to dictate the terms of his employment which it is well settled he may not do.[5]

The Board in its decision in this case stated:

> "Although Waugh's refusal to cross the picket line was a protected activity, the Respondent, as a normal incident of its right to maintain its operations, could have required Waugh to elect whether to perform all his duties or, as a striker, to vacate his job and make way for his replacement by the Respondent."

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[3] *Republic Aviation Corp.* v. *Board*; 1945, 324, U. S. 793, 803; *National Labor Relations Bd.* v. *Illinois Tool Works*, 7 Cir. 1946, 153 F. 2d 811, 814.

[4] We do not have here a case in which the order to cross the picket line was a discriminatory order enforced against a union employee in order to prejudice him by reason of his union membership. Such a situation would, of course, involve other considerations.

[5] *C. G. Conn, Limited* v. *National Labor Relations Board*, 7 Cir., 1939, 108 F. 2d 390, 397; *National Labor Relations Bd.* v. *Montgomery Ward & Co.*, 8 Cir., 1946, 157 F. 2d 486, 496; *National Lab. Rel. B.* v. *Kopman Woracek Shoe Mfg. Co.*, 8 Cir., 1947, 158 F. 2d 103, 108.

It will be noted that the Board here concedes that the Respondent could have required Waugh to cross the picket line or "vacate his job." But by vacating his job the Board seems to mean going out on strike rather than resigning. We cannot follow the Board's reasoning. For Waugh had no grievance against the respondent nor any economic demands against it which a strike on his part might have enforced. On the contrary, if he had gone on strike it could only have been to assist the striking members of the Typographical Union at the Daily Review Corporation plant by seeking to force his employer not to deal with that corporation. If Waugh's union had supported him in such a strike it would have been a secondary strike and as such would have been an unfair labor practice on the part of the union, under Section 8(b)(4) [6] of the Act as amended by the Taft-Hartley Act.

It is true, as the Board points out, that by virtue of the proviso to Section 8(b)(4) Waugh's individual refusal to cross the picket line

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[6] "Sec. 8(a) * * *

"(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * * * *

"(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person; (B) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9; (C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9; (D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees per-

cannot be regarded as a violation of the Act or as convicting his union of an unfair labor practice. But the fact remains that the strike which the Board suggests the respondent could, and we gather it thinks, should have compelled Waugh to undertake would have been an unlawful one if he had gotten any support in it from his own union. And the fact that Waugh's act in refusing to perform that part of his duties which involved crossing the picket line was not a violation of the National Labor Relations Act does not make it any the less a violation of his obligation to his employer to perform the duties of his employment or any the less a proper basis for his discharge for failure to do so.

We think that the Board is wholly unrealistic in the distinction which it seeks to make between the discharge of Waugh for refusing to carry his newspapers across the picket line, which it stamps as unlawful, and the suggested replacement of him as a striker after he had been compelled to vacate his job for refusing to do so, which it thinks would have been perfectly all right. For once Waugh had gone out on his one-man strike against the respondent his place could unquestionably have been filled and his name could then have been dropped from the respondent's payroll under settled principles of law applicable to the replacement of strikers engaged in a strike not involving unfair labor practices.[7] Moreover it is inconceivable that Waugh could have won his strike in view of the fact, already adverted to, that any assistance to him by any union would under Section 8(b)(4) have been an unfair labor practice which it would have been the duty of the Board to prevent.

We need only add that we have assumed in reaching our conclusion in this case that Waugh's refusal to cross the Typographical Union's picket line was intended by him to aid that labor organization. On the evidence in this case that fact is very doubtful, however. For the evidence indicating that Waugh's only concern appeared to be with his own standing as a union man. He stated that he did not want to become known as a "scab" or strike breaker by crossing a picket line. He had no intention to aid the picketing union by refusing to handle the newspapers which were

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forming such work: *Provided*, That nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act."

[7] *Labor Board* v. *Mackay Co.*, 1938, 304 U. S. 333, 345-346; *National Labor Relations Board* v. *Remington Rand, Inc.*, 2 Cir., 1942, 130 F. 2d 919, 928; *National Labor Relations Board* v. *Globe Wireless*, 9 Cir., 1951, 193 F. 2d 748, 750.

being produced in the picketed plant. On the contrary it is undisputed that he readily handled and distributed these newspapers on the two days when they were brought to him across the picket line by a fellow employee who apparently did not have the same compunctions.

We conclude that the respondent was not guilty of an unfair labor practice in discharging Waugh. We are supported in this conclusion by the decision of the Court of Appeals for the Seventh Circuit in *National Labor Relations Board* v. *Illinois Bell Tel. Co.*, 1951, 189 F. 2d 124, cert. den. 342 U. S. 885, in which that court reached the same result upon substantially similar facts. Since Waugh's discharge was the sole basis for the Board's conclusions and order it follows that the order must be denied enforcement and set aside.

The petition of the National Labor Relations Board for the enforcement of its order will be denied and the order will be set aside.

CLARK, *Circuit Judge* (dissenting):

While the Taft-Hartley Act reversed the trend toward unionism fostered by the Wagner Act, it did so by bringing the employer also within the aegis of administrative agency protection, and not by reversion to *laissez faire*. So Congress expressly preserved much of the former statutory protections of the unions, such as the right to strike, §7, 29 U. S. C. A. §157. And when it limited the weapon of the boycott it took plains to except from the newly defined unfair labor practices of a union or its agents the crossing of a picket line. Sec. 8(b)(4), 29 U. S. C. A. §158(b)(4), final sentence, as quoted in note 6 of the opinion. The adoption of this Act was bitterly contested, as is well known; its provisions therefore should be taken as representing the utmost position for which either side could muster sufficient support to obtain the final legislative endorsement. There is thus less reason than usual to extend the prohibitions of the Act by implication. *Rabouin* v. *N. L. R. B.*, 2 Cir., March 24, 1952.

When, therefore, the Board acts in what seems to me the intended spirit of this specific §8(b)(4) exception to hold that a union member does not lose the statutory protection by refusing to cross a picket line, I do not see how we can rule that action erroneous as a matter law. Note that here we are not faced with the question whether or not the Board could have found some violation in all the circumstances; on the contrary we are holding it under legal compulsion so to find. The extent of the step we are taking in thus promulgating a rigid rule of law is highlighted by the authorities relied on. An abstract statement of rights as offset by duties, made by the Supreme Court in 1945, *Republic Aviation Corp.* v. *N. L. R. B.*, 324 U. S. 793, 798, 157 A. L. R. 1081, and a tentative—but not enforced—suggestion of the Board in 1943 that an employer might make and enforce "a rule prohibiting union solicitation during working hours," *Peyton*

Packing Co., Inc., 49 N. L. R. B. 828, 843, are employed to restrict this explicit and unlimited exception of the 1947 Act to *only non-working hours*. To say that a workman is protected from discharge for refusing to cross a picket line only when his refusal is outside of his working hours—here from 9:45 a. m. to 6:30 p. m.—seems to me a practical nullification of the statutory provision. That, by the way, was not discussed in *N. L. R. B.* v. *Illinois Bell Tel. Co.*, 7 Cir., 189 F. 2d 124, *supra*, because the situation there arose before the enactment of the Taft-Hartley Act.

The opinion does not rely at all on any suggestion that Waugh was violating a service contract; that issue, I believe, has thus been properly removed from the case.[1] But with that eliminated, all that is left to support the conclusion negating the statutory exception is, it seems to me, an argument that any prohibition against discharge is unreal in view of the settled right in the employer in an "economic" or competitively justified strike to keep his business going by replacing the strikers. If unreal in this case, it must be considered equally so in all cases of economic strikes. But for good or ill, the distinction is quite settled, not newly developed here, and, following its history beginning with *N. L. R. B.* v. *Mackay Radio & Telegraph Co.*, 304 U. S. 333, 345-346, seems quite natural. It was applied by us in *N. L. R. B.* v. *Remington Rand, Inc.*, 2 Cir., 130 F. 2d 919, 928, and is explained succinctly and clearly in *N. L. R. B.* v. *Globe Wireless, Ltd.*, 9 Cir., 193 F. 2d 748, 750.

Accordingly I can see no legal basis for refusing enforcement of this Board order.

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[1] Although the employer here strongly contended that a collective bargaining contract with the union so required, the Board had ruled the entire contract void because of an illegal union-security clause and, apparently, other defects. A test case on this issue is said to be pending on our calendar; but see *Red Star Express Lines of Auburn, Inc.* v. *N. L. R. B.*, 2 Cir., April 14, 1952, where the Board was sustained in such a view of a union-security contract.

United States Court of Appeals, Second Circuit. Filed Aug. 8, 1952. Alexander M. Bell, Clerk.

IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 208

NATIONAL LABOR RELATIONS BOARD, PETITIONER,

v.

ROCKAWAY NEWS SUPPLY COMPANY, INC., RESPONDENT

DECREE

Before: CHASE, MARIS, and CLARK, *Circuit Judges.*

This cause came on to be heard upon the petition of the National Labor Relations Board (hereinafter referred to as the Board) to enforce its Order dated July 20, 1951. The Court heard argument of respective counsel on April 10, 1952, and has considered the briefs and the transcript of record filed in this cause. On May 12, 1952, the Court, being fully advised in the premises, handed down its decision denying enforcement of the Board's order and setting it aside. In conformity therewith, it is hereby

ORDERED, ADJUDGED AND DECREED that the order of the National Labor Relations Board dated July 20, 1951, directed against Rockaway News Supply Company, Inc., be and it hereby is set aside.

HARRIE B. CHASE,
Judge, United States Court of Appeals for the Second Circuit.
ALBERT B. MARIS,
Judge, United States Court of Appeals for the Second Circuit.

Filed: August 8, 1952.
A true copy,
[SEAL.]

ALEXANDER M. BELL,
Clerk.

UNITED STATES OF AMERICA
SOUTHERN DISTRICT OF NEW YORK

I, Alexander M. Bell, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing: Vol. I. pp. 1-61 & Vol. II. pp. 1-27, inclusive, contain a true and complete transcript of printed portions of the record and proceedings had in said Court, in the case of National Labor Rela-

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tions Board, Petitioner, against Rockaway News Supply Company, Inc., Respondent, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this — day of August in the year of our Lord one thousand nine hundred and fifty-two, and of the Independence of the said United States the one hundred and seventy-seventh.

[SEAL.]

ALEXANDER M. BELL,
Clerk.

87 Supreme Court of the United States

No. —, October Term, 1952

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

ROCKAWAY NEWS SUPPLY COMPANY, INC.

Order extending time to file petition for writ of certiorari

Filed August 1, 1952

Upon consideration of the application of counsel for petitioner,
It is ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including September 9th, 1952.

[File endorsement omitted.]

TOM C. CLARK,
Associate Justice of the Supreme Court of the United States.

Dated this 1st day of August 1952.

89 Supreme Court of the United States

No. 318, October Term, 1952

[Title omitted.]

Order allowing certiorari

Filed October 27, 1952

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted. This case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.